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important for all of the lawyers to know and trust each other because they were potentially liable for the actions of any of the partners.⁵⁰ Lawyers practicing in small partnership also knew the clients of their partners well.⁵¹ Beginning in the early 1900s larger law firms began to develop, but “even as late as the 1960s, the average size of the largest law firms was forty.”⁵² Firms have continued to grow since then, and many have more than 1000 lawyers spread across the globe.⁵³ Law firms market their size and global presence to potential clients and potential employees.⁵⁴

Some of the largest firms have decided to use a structure known as a Swiss verein. The Swiss verein structure became popular for accounting firms before spreading to law firms.⁵⁵ In a Swiss verein, separate partnerships in different countries are affiliated under a global organization without losing their independence.⁵⁶ Most Swiss vereins are organized into individual entities based on geography and national borders.⁵⁷ So a brand will have a global entity and individual organizations in different countries. The brand will have a governing board of directors.⁵⁸ At some vereins, the board of directors tightly controls the direction and branding of the smaller entities, but at others the smaller entities are given much more flexibility.⁵⁹

The Swiss verein presents a variety of benefits for a firm. First, the structure makes regulatory compliance much easier because the individual organizations are only required to

⁵⁰ Robertson, *supra* note 11, at 73.

⁵¹ *Id.*

⁵² Hadfield, *supra* note 49, 1710 n.88 (2008) (citing MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 22 (1993)); *See also*, Thomas et. al., *supra* note 49, at 133 (discussing the economic factors contributing to the growth of large firms).

⁵³ *See* Hadfield, *supra* note 49, at 1710 n.88 (“Today the average size of the largest law firms is well over 1000 (calculation by author)”; *See also*, Thomas et. al., *supra* note 49, at 133.

⁵⁴ *See generally*, Jones Day, *Careers: Limitless Opportunity*, <https://www.jonesday.com/en/careers> (last visited Jan. 27, 2023) (advertising more than 2,400 lawyers at 42 global offices), Dentons, <https://www.dentons.com/en/> (last visited Jan. 27, 2023) (using the tagline “the world’s largest law firm”).

⁵⁵ Megan E. Vetula, *From the Big Four to Big Law: The Swiss Verein and the Global Law Firm*, 22 GEO. J. LEGAL ETHICS 1177, 1181 (2009).

⁵⁶ Robertson, *supra* note 11, at 67.

⁵⁷ *Id.* at 69.

⁵⁸ *Id.* at 68.

⁵⁹ *See Id.* at 70.

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comply with the regulations of one nation.⁶⁰ It also makes financial sense because there is no profit sharing between individual organizations.⁶¹ Profits are made and distributed within a single region allowing companies to pay competitive wages in different markets.⁶² Even though the verein model doesn't allow for global profit sharing, the smaller entities are tied together financially. To accomplish the financial links, the entities engage in cost sharing for expenses like branding and marketing.⁶³

The structure allows for lots of lawyers to work in lots of places without overwhelming regulatory hurdles.⁶⁴ The regulatory benefits of a Swiss verein structure are being challenged in court, but even if more regulatory burdens are imposed, the structure may remain popular for financial reasons.⁶⁵ The sheer size of these firms creates problems with the implementation of the Model Rules. This Note discusses three primary case studies for how the Model Rules about conflicts of interest function, or more accurately fail to function, when applying conflicts of interest and imputation to large law firms structured as Swiss vereins.

B. Cases Involving Conflicts of Interest in Swiss Vereins**1. DLA Piper**

⁶⁰ *Id.* at 69.

⁶¹ *Id.* at 68 (2018).

⁶² *See Id.* *See also*, Dentons, *The World's Largest Law Firm Votes to Combine with Zaanouni in Tunisia* (June 16, 2022) <https://www.dentons.com/en/about-dentons/news-events-and-awards/news/2022/june/the-worlds-largest-law-firm-votes-to-combine-with-zaanouni-in-tunisia> (announcing a combination between Dentons and Zaanouni that likely wouldn't be financially competitive in an organization with global profit sharing).

⁶³ Robertson, *supra* note 11, at 69.

⁶⁴ *See e.g.*, Dentons, *Careers*, <https://www.dentons.com/en/careers> (last visited Jan. 27, 2023) (advertising over 12,000 lawyers globally), Hogan Lovells, *Join Us*, <https://www.hoganlovells.com/en/global-careers> (last visited Jan. 27, 2023) (advertising over 2,600 lawyers in 22 countries worldwide), Norton Rose Fulbright, *Global Coverage*, <https://www.nortonrosefulbright.com/en-gb/global-coverage> (last visited Jan. 27, 2023) (advertising over 3,500 lawyers globally) Backer McKenzie, *About Us*, <https://www.bakermckenzie.com/en/aboutus> (last visited Jan 27, 2023) (advertising 6,500 lawyers at 70 global offices), DLA Piper, *Find A Lawyer* <https://www.dlapiper.com/en-us/people#t=All&sort=relevancy> (last visited Jan. 27, 2023) (listing over 5,500 lawyers).

⁶⁵ Sam Skolnik, *Big Law Operating Model Threatened in Baker McKenzie Mine Case*, BLOOMBERG LAW (Feb. 13, 2023, 5:30 AM), <https://news.bloomberglaw.com/business-and-practice/big-law-operating-model-threatened-in-baker-mckenzie-mine-case>.

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In the first recorded opinion addressing how conflicts of interest are applied to Swiss Vereins,⁶⁶ a bankruptcy court prevented DLA Piper US from representing Project Orange Associates, LLC (“Project Orange”) as bankruptcy counsel because DLA Piper International worked on matters for General Electric (“GE”), Project Orange’s largest unsecured creditor.⁶⁷ The case was primarily analyzed under bankruptcy law, but the court was particularly concerned that DLA Piper admitted that it could have a conflict and then pretended that conflict did not exist because GE and Project Orange had already agreed to stipulations so the two parties were no longer directly adverse.⁶⁸

The court relegated all discussion of if DLA Piper US and DLA Piper International should be considered one firm to a footnote.⁶⁹ The court decided that because DLA Piper US and DLA Piper International hold themselves out to the world as one firm through online marketing and branding, the two entities should be evaluated as a single firm.⁷⁰ The court was particularly concerned that when taken “to its logical conclusion, this would lead to the anomalous result that DLA Piper, on behalf of one client, could be adverse to DLA Piper International, on behalf of one of its clients, without violating ethical standards.”⁷¹ The court’s cursory look at how Swiss vereins operate dismisses the different dangers to the actual concerns ethical rules guard against—commitment to client confidentiality and loyalty—in favor of rigidly applying rules designed for small law firms.

2. Norton Rose Fulbright

⁶⁶ Robertson, *supra* note 11, at 77.

⁶⁷ *In re Project Orange Assocs., LLC*, 431 B.R. 363, 365-366 (Bkrcty. S.D.N.Y. 2010).

⁶⁸ *Id.* at 379.

⁶⁹ *See Id.* at 371 n.3.

⁷⁰ *Id.*

⁷¹ *Id.*

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The question of imputing conflicts across the verein structure has come up on at least two occasions since Norton Rose combined with Fulbright & Jaworski. In the first such question, Fulbright & Jaworski had represented Duke university in litigation opposing John-Wayne branded whiskey attempting to trademark “Duke.”⁷² When Fulbright & Jaworski merged with Norton Rose, a conflict developed because the Canadian arm of Norton Rose had worked for the distillery marketing John-Wayne whiskey.⁷³ A motion to disqualify was never considered because the court dismissed the case on jurisdictional grounds.⁷⁴

More recently, in *Gartner, Inc. v. HCC Specialty Underwriters, Inc.*,⁷⁵ the court dismissed a motion to disqualify Norton Rose Fulbright US (“NRFUS”) from working on a matter for HCC Specialty Underwriters (“HCC”), a parent company to U.S. Specialty Insurance Company (“USSIC”).⁷⁶ Norton Rose Fulbright Australia (“NRFA”) worked on a matter for Gartner Australasia, a subsidiary of Gartner, Inc. (“Gartner”).⁷⁷ USSIC, represented by NRFUS, sued Gartner “seeking a declaration that it was not required to pay Gartner for COVID-19 related [event] cancelations.”⁷⁸ Gartner moved to disqualify NRFUS.⁷⁹

The court declined to disqualify NRFUS. Notably, NRFUS did not argue that it was a separate firm from NRFA.⁸⁰ Instead they argued that even if this was a concurrent conflict of interest, disqualification was not appropriate.⁸¹ The court agreed. First the court concluded that a concurrent conflict of interest did exist.⁸² The court then concluded that there was a low

⁷² Robertson, *supra* note 11, at 78.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ 580 F.Supp.3d 31 (S.D.N.Y. 2022).

⁷⁶ *Id.* at 33.

⁷⁷ *Id.*

⁷⁸ *Id.* at 34-35.

⁷⁹ *Id.* at 33.

⁸⁰ *Id.* at 40.

⁸¹ *See Id.* at 39-41.

⁸² *Id.* at 39.

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likelihood of client confidential information being shared because of the structure of Norton Rose Fulbright and that any information that was shared would not be relevant to the issues in the dispute with USSIC, namely the scope of insurance coverage.⁸³ The court noted that Norton Rose Fulbright's "massive size" and the "de facto separation" between international arms of the verein made "inadvertent disclosures unlikely."⁸⁴ Finally, the court held that disqualification would not be proper because the risk to Gartner was low and disqualification would seriously prejudice USSIC.⁸⁵

3. Dentons

The most detailed case applying ethical conflict of interest doctrine to a law firm structured as a Swiss verein comes out of litigation involving Dentons. The root of the conflict of interest occurred when, Dentons US agreed to represent RevoLaze in a case involving international trade a patent law.

RevoLaze is an Ohio engineering company that holds various patents including a patent on methods of "laser abrading" denim.⁸⁶ After denim manufacturers moved operations overseas and committed to ending the use of sandblasting,⁸⁷ RevoLaze suspected that denim manufacturers abroad were infringing on the patent for "laser abrading."⁸⁸

To protect the patent and income from the patent, RevoLaze decided to file suits in the ITC and in federal district court.⁸⁹ RevoLaze hired Dentons US for this work. Dentons US is one

⁸³ *Id.* at 39-40.

⁸⁴ *Id.* at 40.

⁸⁵ *Id.* at 41 (S.D.N.Y. 2022).

⁸⁶ *Id.* at 479.

⁸⁷ See Cordelia Hebblethwaite & Anbarasan Ethirajan, *Sandblasted jeans: Should we give up distressed denim?*, BBC (Oct. 1, 2011), <https://www.bbc.com/news/magazine-15017790>, for a discussion on the health problems associated with sandblasting denim, including lung disease, silicosis, and death.

⁸⁸ *Revolaze*, 191 N.E.3d at 479.

⁸⁹ *Id.* at 479-480.

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“arm” of a larger Swiss verein.⁹⁰ The Dentons Swiss verein was created in 2015 to enable Dentons to merge with Dacheng, a Chinese based law firm, and still comply with Chinese laws about representation by international firms.⁹¹

To enable the litigation, Revolaze acquired a complicated third party funding agreement. In the agreement, Longford Capital (Longford) promised to provide up to \$8 million for litigation and Dentons US agreed to cap their billing. Revolaze would only have to reimburse Longford if the litigation was successful.

In the ITC, RevoLaze named manufacturers it accused of infringing on the patent and sought a general exclusion order (GEO).⁹² A GEO enables a company “to block importation [of goods made using patented processes] by companies identified as importing infringing products, regardless of whether the [company] was named as a respondent in the ITC litigation.”⁹³ Revolaze sought monetary damages from infringing companies in federal district court because the ITC cannot award damages.⁹⁴

On August 15, 2015, Dentons US filed 17 lawsuits in the United States District Court for the Northern District of Ohio, Eastern Division, seeking damages based on patent infringement. Three days later, on August 18, 2015, Dentons US filed a complaint in the ITC under section 337 of the Tariff Act of 1930 against the same 17 respondents.⁹⁵

⁹⁰ Robertson, *supra* note 11, 78.

⁹¹ Reuters Staff, *Dentons, Dacheng merge to create world’s biggest law firm*, Reuters (Jan. 27, 2015, 7:50 AM), <https://www.reuters.com/article/us-china-law/dentons-dacheng-merge-to-create-worlds-biggest-law-firm-idUSKBN0L01FI20150127>.

⁹² *Revolaze*, 191 N.E.3d at 479.

⁹³ *Id.* at 479-480.

⁹⁴ *Id.* at 480.

⁹⁵ Press release from USITC dated September 17, 2014, New Release # 14-094, https://www.usitc.gov/press_room/news_release/2014/er0917mm1.htm. The respondents were Abercrombie & Fitch Co., American Eagle Outfitters, Inc., BBC Apparel Group, LLC, Gotham Licensing Group, LLC, The Buckle, Inc., Buffalo International ULC, 1724982 Alberta ULC, Diesel S.p.A., DL1961 Premium Denim Inc., Eddie Bauer LLC, The Gap, Inc., Guess, Inc., H&M Hennes & Mauritz AB, H&M Hennes & Mauritz LP, Roberto Cavalli S.p.A., Koos Manufacturing, Inc., Levi Strauss & Co., Lucky Brand Dungarees, Inc., Fashion Box S.p.A., and VF Corporation.

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The Gap (Gap), a respondent in the ITC filed a motion to disqualify Dentons US as counsel.⁹⁶ Gap alleged that Dentons US is a “portal” of the larger Dentons Swiss verein (Dentons Global) which represents Gap on matters around the world.⁹⁷ Gap alleged that the relationship with Dentons Global makes an ethics conflict despite not having a conflict directly with Dentons US. Furthermore, Gap alleged that, because of the relationship with Dentons Global, Dentons US has “ongoing and unfettered access to Gap’s confidential and privileged information relevant to the claims and defenses” in the ITC case.⁹⁸ Gap noted that the information provided to Dentons Canada for work pertaining to a Canadian border Services Agency customs audit includes, “U.S. importation, exportation, financial, and taxation structure, records, and information.”⁹⁹ Gap was not informed of the conflict, and therefore did not consent to the representation.¹⁰⁰

Dentons US did not file a response to Gap’s motion to disqualify, but they alleged in a later motion that due to the Swiss verein structure Dentons US and Dentons Canada are separate entities. Dentons US specifically noted the legal practices of Dentons US and Dentons Canada: “[1] do not have access to each other’s files; [2] do not share client confidential information unless acting ‘as co-counsel’; [3] do not share profits and losses; and [4] are financially and operationally separate.”¹⁰¹ Dentons US said that the separate legal practices of each country wide Dentons practice create an ethical screen.¹⁰² Dentons US also noted that all Dentons US attorneys and paralegals who worked on the matter had not “accessed an files, or received any documents or information from any lawyer, at Dentons Canada LLP or Dentons Europe LLP

⁹⁶ In re *Certain Laser Abraded Denim Garments*, Inv. No. 337-TA-930, Order No. 43, 2015 ITC Lexis 359 (May 7, 2015).

⁹⁷ *Id.*

⁹⁸ *Id.* at *1.

⁹⁹ *Id.* at *1.

¹⁰⁰ *Id.* at *2.

¹⁰¹ *Id.* at *4.

¹⁰² *Id.* at *5.

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relating to Gap.”¹⁰³ Finally Dentons US alleged that Gap had signed a retainer agreement with Dentons Canada that contained a provision waiving potential future conflicts, and that Gap only attempted to disqualify Dentons US after deciding they could not refute the complaint.¹⁰⁴

The ITC relied on The Model Rules of Professional Conduct to decide the motion to disqualify because the model rules “reflect a national consensus.”¹⁰⁵ The ITC specifically used Model Rule 1.7 and Model Rule 1.10 in deciding if Dentons US should be disqualified. The ITC recognized, “a violation of the ethical rules does not result in per se disqualification of the attorney involved.”¹⁰⁶ Instead, the ITC employed a balancing test to weigh the prejudice to another party in the case with the prejudice to the party whose lawyer would be disqualified.¹⁰⁷ The court looked to five factors in the balancing test: “[1] the nature of the ethical violation, [2] the prejudice to the parties, [3] the effectiveness of counsel in light of the violation, [4] the public’s perception of the profession, and [5] whether a disqualification motion was used as a means of harassment.”

Using the Model Rules and the balancing test, the ITC granted Gap’s motion to disqualify Dentons.¹⁰⁸ First, the ITC decided that Dentons Global qualified as a single law firm subject to Model Rule 1.10 because “Dentons holds itself out to the public as a single law firm” and is “an association authorized to practice law” under the definition of law firm in Model Rule 1.0.¹⁰⁹ Because Dentons Canada represented Gap and Dentons US represented RevoLaze, a conflict of interest existed under Model Rule 1.7 and was imputed under Model Rule 1.10.¹¹⁰

¹⁰³ *Id.* at *5.

¹⁰⁴ *Id.* at *6.

¹⁰⁵ *Id.* at *10.

¹⁰⁶ *In re Certain Laser Abraded Denim Garments*, 2015 ITC Lexis 359, at *13.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at *23.

¹⁰⁹ *Id.* at *17.

¹¹⁰ *Id.* at *18-19.

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“Dentons US is therefore banned . . . from helping Complainants bring claims against Gap in this Investigation.”¹¹¹ The ITC notes that Dentons could have obtained informed consent for both parties to waive the conflict, but refused to do so even though the firm had identified the potential conflict of interest.¹¹² Finally, the ITC decided that the conflict had “tainted” the proceedings because Dentons owed a duty of loyalty to Gap and “disregarded” the Rules of Professional Ethics by recognizing a conflict and not clearing it.¹¹³ The prejudice to RevoLaze did not outweigh the factors favoring disqualification, especially because RevoLaze had been informed of the conflict and “nevertheless proceeded against Gap as a named Respondent.”¹¹⁴ The ITC also said that allowing Dentons to represent RevoLaze would “impact negatively on the law profession as a whole” because Dentons Global “holds itself out to the public as a unified global law firm in order to attract business.”¹¹⁵

After Dentons was disqualified from the ITC proceedings, RevoLaze sought new counsel, but could not come to an agreement to cap billing like they had with Dentons.¹¹⁶ RevoLaze then filed a malpractice suit against Dentons and was awarded 32 million dollars at a jury trial.¹¹⁷ On April 28, 2022, the Court of Appeals for the Eighth Appellate District of Ohio affirmed the malpractice judgement against Dentons US.¹¹⁸ On August 30, 2022, the Ohio Supreme Court declined to hear the discretionary appeal and the judgement became final.¹¹⁹

In sum, Dentons US had to pay 32 million dollars for representing a small Ohio company against a multinational corporation because the multinational corporation had previously used

¹¹¹ *Id.* at *19.

¹¹² *Id.*

¹¹³ *Id.* at *20.

¹¹⁴ *Id.* at *22.

¹¹⁵ *Id.* at *22.

¹¹⁶ *RevoLaze LLC v. Dentons US LLP*, 191 N.E.3d 475, 482 (Ohio 2022).

¹¹⁷ *Id.* at 483-484.

¹¹⁸ *RevoLaze LLC v. Dentons US LLP*, 191 N.E.3d 475 (Ohio 2022).

¹¹⁹ *Id.* at 577.

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Dentons Canada, even though Dentons US had no access to files or other confidential information held by Dentons Canada and had not sought access to any such information.

IV. Moving Towards a Workable Solution

As the case studies show, applying the Model Rules to global megafirms creates unintended outcomes. However, scholars have also criticized the Model Rules on concurrent conflicts of interest for a variety of other reasons. This part explores criticisms to the Model Rules on concurrent conflicts of interest and imputation and provides a workable solution that allows courts more flexibility to respond to the varieties in modern legal practice.

A. Failures of the Current System

Almost from their inception, the Model Rules about conflicts of interest have been criticized for their complexity.¹²⁰ Scholars have used such colorful language as, “arcane, a subspecialty whose interpretation can seem as abstruse as explicating the Dead Sea Scrolls”¹²¹ and “not only pervasive, but intractable.”¹²² Kevin McMunigal, a legal ethics professor, proposes that a significant portion of the confusion surrounding Rule 1.7 is because the rule fails to identify its underlying approach.¹²³

McMunigal suggests that there are three theoretical categories that could underly Rule 1.7—risk avoidance, resulting impairment, and appearance.¹²⁴ Under a risk avoidance model, “the boundary between permissible and impermissible conduct is determined by the degree of risk presented.”¹²⁵ A resulting impairment approach sets the boundary at “the point at which the

¹²⁰ Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823, 823 (1992).

¹²¹ *Id.* (quoting Stephen Gillers, *Conflicts: Risky New Rules*, AM. LAW, Sept. 1989, at 39).

¹²² *Id.* (quoting GEOFFREY C. HAZARD JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.7:101, at 217 (2d ed. Supp. 1991)).

¹²³ *Id.* at 825.

¹²⁴ *Id.*

¹²⁵ *Id.*

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attorney's functioning is either actually impaired or certain to be impaired."¹²⁶ Finally, the appearance approach sets the boundary "by reference to the appearance of some impropriety."¹²⁷ Though the three approaches can be closely linked, McMunigal argues that confusion about which category the rules try to take creates confusion about how the rules work.¹²⁸

Confusion is not the only identified problem with the current conflicts of interest doctrines. Janine Griffiths-Baker and Nancy Moore, leading legal ethics scholars, identify four criticisms of the prohibition against the Model Rules treatment of conflicts of interest: "(1) a significantly increased demand for specialist legal services, (2) the globalization of commerce, (3) a dramatic growth in the size of law firms, and (4) much greater mobility withing the profession."¹²⁹

One of the biggest problems with the current rules, restricting a party's ability to choose a lawyer, is routinely noted by courts that speak about disqualification; any time a disqualification motion is granted, one party has their ability to choose a lawyer restricted.¹³⁰

This problem grows exponentially when one considers how law firms have expanded over the last 40 years. Previously, imputed conflicts would typically impact less than 1000 lawyers practicing in the same firm,¹³¹ but now an imputed conflict at a single firm might affect over 10000 lawyers.¹³² This results in the concerning thought experiment that a company could purposefully spread small matters to many large law firms in an effort to disqualify thousands of

¹²⁶ *Id.*¹²⁷ *Id.*¹²⁸ *Id.*¹²⁹ Griffiths-Baker & Moore, *supra* note 11, 2543.¹³⁰ See e.g., Gartner Inc., v. HCC Specialty Underwriters, 580 F.Supp.3d 31, 41 (S.D.N.Y. 2022) ("[The defendants] would be prejudiced if they had to restart anew with a new litigation team."), In re *Certain Laser Abraded Denim Garments*, Inv. No. 337-TA-930, Order No. 43, 2015 ITC Lexis 359 at *21 (May 7, 2015) ("It is important that parties be able to choose and maintain counsel.").¹³¹ Robertson, *supra* note 11, 83.¹³² Dentons, <https://www.dentons.com/en/> (last visited Jan. 27, 2023).

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lawyers.¹³³ This is especially true because Model Rule 1.7(a)(1) prohibits all “directly adverse” representation regardless of if the representation is in a different practice area.¹³⁴

Furthermore, the way courts decide if lawyers are acting within a firm—the holds themselves out as a single law firm standard-- does little to actually show if conflicts of interest will actually impact clients.¹³⁵ As we all know, law firms will espouse many things on websites and marketing to attract clients and talent. For example, Dentons highlights a “poly centric and purpose-driven approach .”¹³⁶ Though the buzzwords might seem valuable, they actually say very little about how the firm works for its clients. Similarly, marketing says very little about how the firm is structured and what risk conflicts of interest in the firm pose to actual clients. Griffiths-Baker and Moore criticize this approach because, “no account is taken of the likelihood of such information being passed.”¹³⁷

The system for dealing with conflicts of interest derived under the Model Rules is not the only way to approach conflicts of interest. In the European Union, preclusive conflicts only arise when a lawyer represents two or more clients whose interests conflict in the same matter, or where there is a breach of confidence or impaired judgement.¹³⁸ In the United Kingdom, conflicts of interest do not impute unless the fee earner actually holds confidential information.¹³⁹ While these changes may solve some of the problems identified in this Note, smaller changes to the Model Rules could solve those same problems without a complete overhaul of how conflicts of interest are understood in America.

B. Proposed Change to Model Rule 1.7(a)

¹³³ Robertson, *supra* note 11, 83.

¹³⁴ MODEL RULES OF PRO. CONDUCT r. 1.7(a) (AM. BAR ASS’N 1983).

¹³⁵ Robertson, *supra* note 11, 81.

¹³⁶ Dentons, <https://www.dentons.com/en/> (last visited Jan. 27, 2023).

¹³⁷ Griffiths-Baker & Moore, *supra* note 11, 2552.

¹³⁸ Daniel J. Bussel, *No Conflict*, 25 GEO. J. LEGAL ETHICS 207, 211 (2012).

¹³⁹ Griffiths-Baker & Moore, *supra* note 11, 2543.

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This note proposes changing Model Rule 1.7(a) to read, “A Lawyer shall not represent or continue to represent a client if the representation creates a concurrent conflict of interest. A concurrent conflict of interest exists where there is a significant risk that the interests of the lawyer, or law firm, including the duties to a client, former client, or third party of the lawyer, or law firm, will materially and adversely affect the representation of the client, except as permitted in (b).” Changing the Model Rule would give states guidance to similarly adjust their own rules and impact cases, such as those above, where the Model Rules have been used as the starting point for the analysis of disqualification in Federal Court.

This proposed rule has two primary changes. First, it combines Model Rule 1.7 and Model Rule 1.10. Second, the proposed rule combines the two prongs of Model Rule 1.7(a) into a single question of whether the interest or duties to clients will materially and adversely affect the representation of the client. The two changes serve to allow flexibility in the imputation of conflicts that can better serve both small and large firms and focus the inquiry on the impact to a client.

The proposed rule allows for flexibility in the imputation of conflicts. Under the Model Rules, if any lawyer in a firm has a conflict based on the concurrent representation of a client, that conflict is imputed to all lawyers in the firm.¹⁴⁰ This means that the only question asked during imputation is whether the lawyers are part of the same firm. The primary factors for the inquiry into if a firm is the same is if the lawyers are engaged in a “law partnership, professional corporation, sole proprietorship or other association authorized to practice law.”¹⁴¹ This inquiry is basic when the firm clearly operates in one of those categories, but in the context of a more complicated structure, such as a Swiss verein, courts may also look to whether the organization

¹⁴⁰ MODEL CODE OF PRO. CONDUCT r. 1.10 (AM. BAR ASS’N 1983).

¹⁴¹ MODEL CODE OF PRO. CONDUCT r. 1.0(c) (AM. BAR ASS’N 1983).

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holds itself out to be a single law firm.¹⁴² This oversimplified inquiry fails to take into account how different organization structures present different risks to clients. However, the proposed rule shifts the inquiry away from a simple question of whether the lawyers are members of the same firm, to how the conflict of any member of the law firm impacts the clients. This creates flexibility in the system to examine the qualities of a firm that either increase or decrease risk to a client. These qualities could include information like data sharing practices, profit and cost sharing, physical location of lawyers, number of lawyers, language barriers, the subject matter that the different lawyers are working on, and any other factors that would either increase or decrease risk.

This proposed rule focuses the question of whether a conflict exists on the impact to a client. A primary goal of Model Rule 1.7 was to protect “the loyalty and independent judgement” required for an ethical client lawyer relationship.¹⁴³ But, a rule with zero tolerance for concurrent conflicts of interest across an entire firm is not the only way of achieving the loyalty and independent judgement that the Model Rules seek.

The proposed rule creates an objective standard such that conflicts exist when there is “significant risk. . . of. . . materially and adversely affect[ing] the representation of the client.” This means that the loyalty and independent judgement are protected in situations where there is actual risk to the client. Concurrent conflicts of interest is always about balancing the risks to one client with the desires of another. An objective standard for evaluating that risk allows firms to balance all clients, including the small clients for whom they work on fewer matters. Simultaneously it protects the original client from activity that would genuinely cause risk of bad

¹⁴² See, in re *Certain Laser Abraded Denim Garments*, Inv. No. 337-TA-930, Order No. 43, 2015 ITC Lexis 359 at *13 (May 7, 2015).

¹⁴³ MODEL CODE OF PRO. CONDUCT r. 1.7 cmt. 1 (AM. BAR ASS’N 1983).

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representation. The proposed rule also firmly focuses on the risk avoidance theory advanced by Kevin McMunigal.¹⁴⁴ Such a focus would help ease the confusion that underlies conflicts of interest doctrine.¹⁴⁵

Furthermore, clients themselves have power to choose lawyers based on their relationship with that lawyer. If a client feels that a lawyer betrayed them the client is still free to seek other counsel under the proposed rule. A feeling of betrayal should not be sufficient to prevent lawyers from working with other clients, but the potential for lost revenue will likely still keep many firms from undertaking work that they know would frustrate a current client even if that work did not present enough risk to the client to qualify as a concurrent conflict of interest under the proposed rule.

C. Applying the Proposed Rule

This Section applies the proposed rule to four cases that have already been examined in this Note. First, the proposed rule is applied in *Dentons v. Revolaze* because that case had the most details about how the Swiss verein structure impacts clients. Then it is applied to the cases involving *DLA Piper* and *Norton Rose Fulbright*. Finally, the proposed rule is applied to *Jones Day's* work with *Celgard* and *Apple*.

Using the proposed rule significantly alters the analysis of each of the above cases. Instead of first defining if there is a conflict of interest and then asking if that conflict of interest imputes across the firm, the proposed rule asks if the work of any member of the firm results in significant risk of material limitation to a client. There is no imputation analysis because the work of one lawyer at a firm is analyzed when deciding if it presents a conflict for any other member of the firm.

¹⁴⁴ McMunigal, *supra* note 120, 825.

¹⁴⁵ *Id.*

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1. Applying the Proposed Rule to *Dentons v. Revolaze*

The proposed rules would alter the analysis of the *Dentons* case and would likely lead to a different outcome. The proposed rule creates a concurrent conflict of interest if the lawyer or any lawyer in the firm has a conflict that materially and adversely impacts the client. The first step of this analysis is still to decide if *Dentons Canada* and *Dentons US* were the same firm. This analysis would likely mirror the analysis in *in re Certain Laser Abraded Garments* because the proposed rule does not modify the definition of a law firm under Model Rule 1.0.¹⁴⁶ A court would likely still conclude that *Dentons Canada* and *Dentons US* are a single firm under Model Rule 1.0 because the two arms of the *verein* are still “an association authorized to practice law” and still hold themselves “out to the public as a single law firm.”¹⁴⁷ Unlike the current rules, however, under the proposed rule the conflict doesn’t automatically impute across the entire firm.

Instead, the court would have to decide if the work of a different lawyer at the firm presents a significant risk that representation of one client would materially and adversely affect the representation of another. In *in re Certain Laser Abraded Garments*, *Dentons* made arguments that the structure of the Swiss *verein* significantly mitigated the risk to both *Gap* and *Revolaze*.¹⁴⁸ These arguments included that separate legal practices, lack of access to files and client confidential information, and lack of profit sharing essentially created an ethical screen that was sufficient to protect the clients.¹⁴⁹ Furthermore, the lawyers and paralegals for *Dentons US* had not “accessed any files, or received any documents or information from any lawyer, at *Dentons*

¹⁴⁶ See MODEL CODE OF PRO. CONDUCT r. 1.0 (c) (AM. BAR ASS’N 1983); *In re Certain Laser Abraded Denim Garments*, Inv. No. 337-TA-930, Order No. 43, 2015 ITC Lexis 359 at *17 (May 7, 2015).

¹⁴⁷ See *In re Certain Laser Abraded Denim Garments*, Inv. No. 337-TA-930, Order No. 43, 2015 ITC Lexis 359 at *17 (May 7, 2015).

¹⁴⁸ *Id.* at *4-5 (May 7, 2015).

¹⁴⁹ *Id.*

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Canada LLP or Dentons Europe LLP relating to Gap.”¹⁵⁰ The ITC largely ignored these arguments because Model Rule 1.7(a) defines any directly adverse representation as a concurrent conflict of interest that is automatically imputed under Model Rule 1.10 across an entire firm.¹⁵¹ Dentons arguments about the actual risk take on much more significance under the proposed rule. A structure where information is not shared across the firm significantly reduces the risk to Gap when Dentons US worked on behalf of Revolaze.

2. Applying the Proposed Rule to DLA Piper

The court in *in re Project Orange*, dismissed the claim that DLA Piper International and DLA Piper US are separate firms very quickly because of the concern that DLA Piper US and DLA Piper International could end up on two different sides of the same litigation. This concern rings true because that is an absurd outcome, but it is not an inevitable outcome.

The proposed rule would avoid that outcome without rigidly applying Model Rule 1.7 and 1.10 on all firms that are linked through branding and organizational structure. Under the proposed rule, the proper analysis is if the work presents a material and adverse risk to either client. If two arms of a verein were to represent clients in a directly adverse position on the same litigation, any sharing of information or change in position based on implicit loyalty would present a great danger to the client. Almost any confidential information that is shared in such a scenario would hurt the client whose information was shared because opposing counsel would have direct access to that information. Furthermore, in directly adverse litigation one client wins and one client loses, or in the case of settlement one client sacrifices some things and the other client sacrifices other things. Any concern about the global client base of the firm could have

¹⁵⁰ *Id.* at *5.

¹⁵¹ *See generally, Id. See also* MODEL CODE OF PRO. CONDUCT r. 1.7 (a) (AM. BAR ASS’N 1983); MODEL CODE OF PRO. CONDUCT r. 1.10 (AM. BAR ASS’N 1983).

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material impacts on a lawyer's quality of work. Because the danger of sharing even small amounts of client data and the impacts of even inadvertent breaks with client loyalty, no amount of risk mitigation would eliminate the material and adverse risk to a client.

3. Applying the Proposed Rule to Norton Rose Fulbright

Applying the proposed rule to Norton Rose Fulbright in *Garnter*, likely would not change the outcome of that case. In fact, the court discussed many of the factors relevant under the proposed rule when it concluded that disqualification would have been improper.¹⁵² The primary difference under the new rule is that instead of concluding there is a concurrent conflict of interest but deciding not to disqualify NRFUS, the court would have evaluated similar factors to decide that no concurrent conflict of interest existed.

Under the proposed rule, the primary question of if a concurrent conflict of interest exists is if there is material and adverse risk to a client. In this case, there is little to no actual risk to Gartner. As the court noted when concluding not to disqualify, the size and structure of Norton Rose Fulbright means inadvertent disclosures are unlikely.¹⁵³ Furthermore, any accidental disclosure is unlikely to pose material risk to Gartner because the subject matter of NFRA's work was different than the work NFRUS engaged in for USSIC.¹⁵⁴ Because there is so little risk to Gartner, under the proposed rule there would not even be a conflict in the first place.

4. Applying the Proposed Rule in Celgard v. L.G. Chem

It is much more difficult to analyze how the new rule would apply to the disqualification of Jones Day in Celgard v. L.G. Chem because the court did not analyze any factors about

¹⁵² See generally *Gartner, Inc. v. HCC Specialty Underwriters, Inc.*, 580 F.Supp.3d 31 (S.D.N.Y. 2022).

¹⁵³ See *Id.*

¹⁵⁴ See *Id.*

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imputation. However, information about the firm makes it clear that given how the firm is structured, a court would likely reach the same outcome under the proposed rule.

Jones Day, like Dentons, DLA Piper, and Norton Rose Fulbright is an international firm with many lawyers,¹⁵⁵ but important structural differences mean conflicts of interest pose a much greater danger to clients than at firms structured as Swiss vereins. Jones Day operates as “one firm worldwide” and touts “cross practice and cross office client engagement.”¹⁵⁶ A commitment to “cross office client engagement” implies less client confidentiality than at an arm of a Swiss Verein with no access to client files from other entities. Furthermore, Jones Day uses a managing partner system that vests significant control over the global organization in a single partner. This centralized control and the existence of profit sharing across the organization mean that negative impacts to a client in one country can be felt globally.

Together the likely access to client confidential information and global reach of negative effects to clients mean that there is a much greater likelihood that a conflict of interest in one location would materially and adversely affect a client in another location. In the case of *Celgard v. LG Chem*, discussed *infra* Part I, the court would likely still conclude that Jones Day was disqualified from representing Celgard because the impact to Apple as a purchaser from LG Chem would still be material and adverse.

V. Conclusion

The legal profession is increasingly practiced on a global scale.¹⁵⁷ These firms look very different from the smaller and more local firms that the Model Rules envisioned when they were codified in the 1980s. Global megafirms, especially those structured as Swiss vereins, pose

¹⁵⁵ Jones Day, *Firm History*, <https://www.jonesday.com/en/firm/history?tab=overview> (last visited Jan. 27, 2023) (advertising 2,500 lawyers globally).

¹⁵⁶ *Id.*

¹⁵⁷ See generally, Hadfield, *supra* note 49, Thomas et. al., *supra* note 49, Cassandra Burke Robertson, *supra* note 11.

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different risks to clients based on concurrent conflict of interest than smaller local firms. This note proposes a modification to Model Rule 1.7(a) that centers actual risk to clients over mechanical imputation of all conflicts across a firm. Further scholarship in this area could consider how other Model Rules, such as Rule 1.9 Duties to Former Clients or Rule 7.3 Solicitation of Clients, should be revised to better capture the realities of globalized legal practice.

Applicant Details

First Name	William											
Last Name	McCabe											
Citizenship Status	U. S. Citizen											
Email Address	will.j.mccabe@gmail.com											
Address	<table><tbody><tr><td>Address</td></tr><tr><td>Street</td></tr><tr><td>713 South Henry Street</td></tr><tr><td>City</td></tr><tr><td>Williamsburg</td></tr><tr><td>State/Territory</td></tr><tr><td>Virginia</td></tr><tr><td>Zip</td></tr><tr><td>23185</td></tr><tr><td>Country</td></tr><tr><td>United States</td></tr></tbody></table>	Address	Street	713 South Henry Street	City	Williamsburg	State/Territory	Virginia	Zip	23185	Country	United States
Address												
Street												
713 South Henry Street												
City												
Williamsburg												
State/Territory												
Virginia												
Zip												
23185												
Country												
United States												
Contact Phone Number	8576362950											

Applicant Education

BA/BS From	University of South Carolina-Columbia
Date of BA/BS	May 2021
JD/LLB From	William & Mary Law School
	http://law.wm.edu
Date of JD/LLB	May 18, 2024
Class Rank	15%
Law Review/Journal	Yes
Journal(s)	William & Mary Bill of Rights Journal
Moot Court Experience	No

Bar Admission**Prior Judicial Experience**

Judicial Internships/ Externships	No
--------------------------------------	----

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

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Bisarya, Sumit
s.bisarya@idea.int
Combs, Nancy
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757-221-3830

This applicant has certified that all data entered in this profile and any application documents are true and correct.

William McCabe
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June 11, 2023

The Honorable Jamar K. Walker
U.S. District Court, E.D. Va.
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

Dear Judge Walker:

I am a rising third-year law student at William & Mary Law School, where I am ranked in the top 12% of my class, serve as a member of the *William & Mary Bill of Rights Journal*, and serve as the President of the International Law Society. I am writing to apply for a judicial clerkship in your chambers for the 2024-25 term. I am motivated to serve as a clerk because I intend to go into a public service legal career, and through the experience of working as a judicial clerk I would be able to contribute to the administration of justice in a highly impactful way. Furthermore, I plan to go into litigation, and working as a judicial clerk would help me to become a more skillful advocate by providing the invaluable experience of evaluating lawyers' arguments before a court on a broad array of subjects and learning firsthand how a court functions.

My experiences during law school have helped prepare me to serve as a judicial clerk, and I have pursued several opportunities to acquire practical legal skills outside of a classroom setting. Through my externship experience at Gordon & Rees, for example, I have strengthened my legal research and writing skills in a real-world setting by researching topics covering various legal practice areas and preparing memos on diverse issues. I will expand on that experience through my work this summer for the Massachusetts Commission Against Discrimination and in my work for the Law School's Immigration Clinic next fall, both of which will involve direct interaction with clients and firsthand experience with litigation.

My academic activities have also helped me to build the skills necessary to be an effective clerk. As a staff member on the *William & Mary Bill of Rights Journal*, I have gained a deeper understanding of legal reasoning and become a more attentive reader through cite-checking, and I have sharpened my research skills through the Note-writing process. In my coursework, I have also improved my research and writing skills, particularly in the courses I took in Post-Conflict Justice and Islamic Law, each of which required me to write a 30-page final research paper, for which I earned high grades. These classes and others also required me to create and deliver presentations on various legal topics in collaboration with other students. This work enhanced my project management, interpersonal communication, and teamwork abilities, which I will bring to your chambers to work effectively with staff attorneys, clerks, and others as a strong team member.

Enclosed for your consideration are my resume, transcript, and writing sample, as well as letters of recommendation from Professor Nancy Combs, Professor Christie Warren, and Mr. Sumit Bisarya, the Head of Constitution-Building Processes for the International Institute for Democracy and Electoral Assistance. Thank you for considering my application, and I would be grateful for the opportunity to discuss my qualifications further in an interview.

Respectfully,


William McCabe

William McCabe

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EDUCATION

William & Mary Law School, Williamsburg, Virginia

J.D. expected, May 2024

G.P.A.: 3.6, Class Rank: 21/175 (tied)

Honors: **William & Mary Bill of Rights Journal**
Phi Delta Phi International Legal Honor Society, Member

Publications: *Convening for (Climate) Change: The Constitutional Case for a U.S. Climate Assembly*,
32 WM. & MARY BILL RTS. J. (forthcoming 2024)

Activities: International Law Society, President
Public Service Fund, General Board Member
Labor and Employment Law Society
Research Assistant for Profs. Evan Criddle and Christie Warren, Summer 2023

University of South Carolina, Columbia, South Carolina

B.S., *magna cum laude*, International Business and Finance, French and European Studies minors, May 2021

G.P.A.: 3.949

Honors: Graduation with Leadership Distinction in Global Learning

Activities: French Club (2019-2021), Vice President (Fall Semester 2019)
Fencing Club (2017-2019)

Study Abroad: ICHEC Brussels Management School, Brussels, Belgium, February – June 2020

EXPERIENCE

Massachusetts Commission Against Discrimination, Boston, Massachusetts

General Counsel Intern June to August 2023

Will research employment discrimination issues and assist in preparing for public hearings and court proceedings.

Gordon Rees Scully Mansukhani, LLP, Williamsburg, Virginia

Legal Extern January to April 2023

Conducted legal research on legal issues involving FLSA employee classification, contract enforceability, wrongful termination, and other topics in employment law practice.

International Institute for Democracy and Electoral Assistance, The Hague, Netherlands

Constitution-Building Program Intern May to August 2022 & Fall 2022

Researched contemporary constitutional issues such as citizens' assemblies, diaspora democratic participation and representation, and constitutional structures of countries across diverse regions. Prepared reports comparing countries' constitutional history and structures and responses to constitutional challenges.

McAfee, Brussels, Belgium

Policy Intern (Europe, Middle East, Africa) February to March 2020

Attended client meetings and EU cybersecurity conferences to monitor client relationships and public policy priorities. Analyzed cybersecurity topics to identify opportunities and developments.

Massachusetts Environmental Police – Fiscal Unit, Boston, Massachusetts

Fiscal Intern May to June 2019 & January 2020

Compiled and analyzed departmental expenses to identify variation between actual expenditures and projections. Performed detailed quality assurance review of boat registration and title documents.

Nobles Day Camp, Dedham, Massachusetts

Group/Swing Counselor and Bus Monitor Summers 2015 to 2021

Organized indoor and outdoor activities for about 30 campers ranging from 5 to 14 years old.



Unofficial Transcript

Note to Employers from the Office of Career Services regarding Grade Point Averages and Class Ranks:

- Transcripts report student GPAs to the nearest hundredth. **Official GPAs are rounded to the nearest tenth and class ranks are based on GPAs rounded to the nearest tenth.** We encourage employers to use official Law School GPAs rounded to the nearest tenth when evaluating grades.
- Students are ranked initially at the conclusion of one full year of legal study. Thereafter, they are ranked only at the conclusion of the fall and spring terms. William & Mary does not have pre-determined GPA cutoffs that correspond to specific ranks.
- Ranks can vary by semester and class, depending on a variety of factors including the distribution of grades within the curve established by the Law School. Students holding a GPA of 3.6 or higher will receive a numerical rank. All ranks of 3.5 and lower will be reflected as a percentage. The majority of the class will receive a percentage rather than individual class rank. In either case, it is likely that multiple students will share the same rank. Students with a numerical rank who share the same rank with other students are notified that they share this rank. Historically, students with a rounded cumulative GPA of 3.5 and above have usually received a percentage calculation that falls in the top 1/3 of a class.
- Please also note that transcripts may not look the same from student-to-student; some individuals may have used this Law School template to provide their grades, while others may have used a version from the College's online system.

Transcript Data						
STUDENT INFORMATION						
Name : William J. McCabe						
Curriculum Information						
Current Program						
Juris Doctor						
College: School of Law						
Major and Department: Law, Law						
***Transcript type:WEB is NOT Official ***						
DEGREES AWARDED						
Sought: Juris Doctor Degree Date:						
Curriculum Information						
Primary Degree						
College: School of Law						
Major: Law						
	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Institution:	16.000	16.000	16.000	12.000	42.00	3.50

LAW	703	LW	Directed Reading		P	1.000	0.00		
LAW	759	LW	Priv/In Hse Counsel Extern		P	2.000	0.00		
LAW	761	LW	W&M Bill of Rights Journal		P	1.000	0.00		
				Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:				16.000	16.000	16.000	12.000	42.00	3.50
Cumulative:				62.000	62.000	62.000	54.000	191.80	3.55
Unofficial Transcript									
TRANSCRIPT TOTALS (LAW - FIRST PROFESSIONAL)					-Top-				
				Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:				62.000	62.000	62.000	54.000	191.80	3.55
Total Transfer:				0.000	0.000	0.000	0.000	0.00	0.00
Overall:				62.000	62.000	62.000	54.000	191.80	3.55
Unofficial Transcript									
COURSES IN PROGRESS					-Top-				
Term: Fall 2023									
Subject	Course	Level	Title	Credit Hours					
LAW	305	LW	Trust and Estates	3.000					
LAW	452	LW	Employment Discrimination	3.000					
LAW	485	LW	Immigration Law	3.000					
LAW	496	LW	Intl Business Transactions	3.000					
LAW	619	LW	Supreme Court Seminar	1.000					
LAW	786	LW	Immigration Clinic I	3.000					
Unofficial Transcript									

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RELEASE: 8.7.1

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Christie S. Warren
Professor of the Practice of International
and Comparative Law and Director, Center
for Comparative Legal Studies and Post-Conflict Peacebuilding

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June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is a pleasure for me to write this recommendation for Will McCabe, who is applying for a clerkship in your chambers. Will has been my student for the past year, and I am very familiar with his skills and abilities.

Will's resume speaks for itself and demonstrates his commitment to hard work and excellence. By the time he began law school at William & Mary, he had already earned a number of awards and accolades, including graduating magna cum laude from the University of South Carolina, where he was active in several extracurricular clubs and sports and received leadership distinction in global learning. His trajectory of excellence has continued without pause during his first two years of law school; in addition to maintaining a high-grade point average, he is active in a number of our student organizations and serves as President of our International Law Society.

As of the end of his second year of law school, Will is in the top tier of his class. In addition to his courses, he is a member of our Bill of Rights Journal and has authored an article on constitutional issues and climate change that will be published next year. His research and writing skills are excellent. I have had him in two of my courses during this past academic year; each course required that he write a major research paper, and he earned top grades in both classes. His work was so strong that I have hired him as my Faculty Research Assistant for this summer.

One of my responsibilities as Director of the Center for Comparative Legal Studies is hiring a small group of exceptionally talented students to serve as international interns each summer. Last year I hired Will to intern at one of our most competitive and prestigious placements, the International Institute for Democracy and Electoral Assistance at the Hague. Throughout the summer, I monitored the work he was doing, and at the conclusion of the internship I debriefed his supervisor. Will received outstanding reviews from the director of the Constitution-Building Processes Programme, where he had carried out comparative constitutional research across a variety of legal systems. The director remarked to me that he had rarely known a law student as adept at quickly grasping the nuances of the type of comparative research Will had done and producing high quality reports without assistance.

Importantly, Will is a pleasure to work with. He does not have the type of ego one might expect in someone with his abilities; he is popular among his classmates and has a lovely personality. I can't think of a better person to work with in challenging circumstances when perfect work products are consistently required. If I were a judge, he is exactly who I would want to hire.

I recommend Will completely and without reservation. If you give him the opportunity to work with you, I promise you will not be disappointed. If you have any follow-up questions, or if I can provide you with any additional information, please do not hesitate to let me know.

Sincerely,

/s/

Christie S. Warren
Professor of the Practice of International and
Comparative Law Director, Center for Comparative
Legal Studies and Post-Conflict Peacebuilding

Christie S. Warren - cswarr@wm.edu - (757) 221-7852

International IDEA
The Hague, Netherlands

June 5, 2023

Your Honor:

I am pleased to recommend Will McCabe to you as a prospective law clerk. Will worked for me as an intern in the Summer of 2022 at the International Institute for Democracy and Electoral Assistance (International IDEA) in The Hague, and he is an exceptional individual who will be highly effective as a law clerk.

International IDEA is an intergovernmental organization mandated to support democracy and democratic transitions. I have a J.D. from Columbia University and have worked in international development and constitution-building for over 15 years. I currently head the Constitution-Building Programme, which provides comparative knowledge and support in relation to constitution-building processes and comparative constitutional design.

For the two months Will worked with our team as a legal intern, I interacted with him daily and supervised his work on all projects. One significant task Will completed was producing memoranda detailing the constitutional history, structure, and current challenges of Albania, Kosovo, Serbia, and Montenegro in connection with our organization's expanding presence in the Western Balkan region. He also compiled comparative data on diaspora democratic participation and representation in various countries and prepared a memorandum on parliamentary oversight mechanisms established by the Armenian constitution as we sought to provide guidance on constitutional reform to representatives of the Armenian government. Will also researched the development of citizens' assemblies for climate ("climate assemblies") in Luxembourg and Spain and attended a virtual conference on the growth of climate assemblies across Europe to assist my colleague Sharon Hickey in her research on the constitutional implications and possibilities of these bodies.

Will was an outstanding member of the team and is among the best interns we have hired. Will accomplished his assignments with a high level of independence, competence, and diligence. He possesses a high degree of intellectual curiosity and brings a broad base of knowledge to his work. He always completed his projects on time and without requiring further revisions. He completed his assignments independently, and he was comfortable asking for clarification or guidance when directions were unclear. Will showed a deep curiosity for the subject matter and was always willing to take on a new kind of project. He was a friendly, sociable presence in the office and worked well with the other International IDEA employees, including the other law student intern. Overall, he was a real pleasure to have as a member of the team.

I should like to emphasize two things that struck me strongly during the short time Will was with us. The first was Will's intense intellectual curiosity to understand the issues he was writing about—the history and context of the different political environments we were dealing with. Will has the admirable quality of never just asking "what?" but always seeking to understand "why." Secondly, Will exhibited important values of caring for those around him, supporting those who needed help without being afraid to ask for help himself, and a strong sense of family and where he comes from. I find increasingly that our young interns—in their race to get ahead of some perceived competition, perhaps—are often lacking in these values which, for me, are essential in considering the kinds of persons we should be supporting in their careers.

I am pleased, therefore, to offer my strong, unconditional recommendation. Beyond the general information provided here, I am happy to answer any specific questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sumit Bisarya', with a stylized flourish at the end.

Sumit Bisarya, JD
Head of Mission, the Netherlands
Head of Constitution-Building, International IDEA

Nancy Combs
Robert E. & Elizabeth S. Scott Research Professor,
Ernest W. Goodrich Professor of Law and
Director, Human Security Law Center

William & Mary Law School
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Williamsburg, VA 23187-8795

Phone: 757-221-3830
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June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Recommendation for Will McCabe

Dear Judge Walker:

I am writing to recommend Will McCabe, who has applied for a clerkship in your Chambers. Will has taken three classes with me, and I've had countless conversations with him, so I can attest with confidence that Will is a very smart and engaged student who will surely make an excellent law clerk.

I first met Will when he was a 1L in my Criminal Law class. I taught two sections of Criminal Law that year, but despite having 120 first-year students, I got to know Will quite well due to his interest in international law and policy. He also spent his 1L summer in The Hague where I lived for a decade, so we conversed frequently both about legal topics as well as apartments, commuting and other logistics.

In one sense, Will is a typical clerkship applicant. He has very good grades, which reflect mastery of the material, strong legal analytical skills and hard work. In the three classes Will has taken with me, I've seen ample evidence of all of these qualities. Will's class participation shows keen engagement with the material. He does the reading; he understands the doctrine (typically at a very high level), and he enjoys thinking about more complex applications and more intricate policy challenges. Will also is a genuinely nice person. As mentioned, I've had many highly enjoyable conversations with him, and I've seen him interact with his peers. He has great social skills and would be an unquestionable asset to the collegiality of your chambers.

If this was all there was to say about Will, I would certainly urge you to consider his application favorably. He is obviously very smart, and he has the skills and temperament to be an excellent law clerk. But I recognize that many of your other applicants present similar qualities. Will, however, is unique in two interrelated ways that likely are highly relevant to your selection decision.

First, Will is one of the most intellectually curious students that I've ever had the pleasure to know. Most students come to office hours to rehash some knotty question of doctrine that they failed to understand or to seek advice on career plans or even exam prep. My conversations with Will, by contrast—whether in office hours or just in the hall between classes—are far more eclectic, and they commonly focus on some esoteric book he is reading (unrelated to class) or a paper he is writing. Will is a true intellectual. He is interested in a host of topics (history, philosophy, and every aspect of law) and he is able to discuss these subjects with depth and sophistication. For this reason alone, you will be happy to have him in chambers. A young person who continues to be eager to learn about a wide range of topics—even in law school—is both a rare breed and a pleasure to have around.

Second, Will is an excellent writer. Will's impressive transcript reflects his overall mastery of doctrine and facility with legal reasoning. But a more careful look at his transcript reveals his impressive writing. Will's class rank shows him to be one of our best and brightest in general, but his grades in his legal writing classes and in paper seminars are especially strong. This should come as no surprise. A student who is as well-read and engaged with ideas as Will is bound to value and develop exemplary writing skills.

As you can tell, I consider Will to be an extremely strong applicant for a clerkship position, and I hope you'll reach out to allow me to answer any questions you might have.

Sincerely,

/s/

Nancy Combs
Ernest W. Goodrich Professor of Law

Nancy Combs - ncombs@wm.edu - 757-221-3830

and Director, Human Security Law Center

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William McCabe

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WRITING SAMPLE

This document is adapted from a legal memo I wrote during the Spring 2022 semester for my Legal Research and Writing class. This memo is substantially my own work and has not been edited by others.

**IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF GEORGIA
COLUMBUS DIVISION**

REVEREND FELDSPAR IVORY-PERIDOT,)	
)	
<i>Plaintiff,</i>)	Civil Action No: 42487cv-03072022
)	Jury Trial Waived
v.)	
)	William McCabe
STERLING MOONSTONE, et al.,)	
)	I certify this document contains
<i>Defendants.</i>)	3,442 words.

**MEMORANDUM SUPPORTING DEFENDANT DIAMOND MARKETS, INC.'S
MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

This case features a plaintiff seeking over half a million dollars for a mere forty-five minutes of inconvenience. Georgia case law strongly emphasizes sensitivity to context when evaluating the reasonableness of a detention, its manner, and its duration, and here, the facts favor summary judgment. Ivory-Peridot activated the antishoplifting alarm, giving Diamond's agent Sapphire Garnet reasonable grounds to detain her on suspicion of shoplifting. The meeting room where Diamond employees are instructed to bring suspected shoplifters was busy, requiring Garnet to quickly improvise and bring Ivory-Peridot to the next closest room. Once Diamond investigated Ivory-Peridot's suspected shoplifting, the store manager personally apologized to her, gave her a gift card worth more than her purchased items, and allowed her to leave. Because the undisputed facts show Diamond's detention of Ivory-Peridot was reasonable and appropriate under the circumstances, Diamond respectfully requests the Court grant its Motion for Summary Judgment.

STATEMENT OF FACTS

At 2:10 PM on January 4, 2021, Sapphire Garnet was performing her routine security rounds when the antishoplifting alarm went off. (Garnet Dep. at 4-5.) Garnet saw Feldspar Ivory-Peridot sitting on the floor near the exit with her cane next to her and her tote bag lying outside the exit, so she ran to retrieve the tote bag and then to check on Ivory-Peridot, touching her arm and offering to help her up. (Garnet Dep. at 5.) Shouting a little to be heard over the loud alarm, Garnet asked to see Ivory-Peridot's receipt and asked if she had seen the signs informing customers of Diamond Markets, Inc.'s use of antishoplifting devices. (*Id.*) Garnet also identified herself, as called for in Diamond's loss prevention protocol. (*Id.*) Ivory-Peridot responded that she had not seen the signs and that the machine had not printed a receipt. (Ivory-Peridot Aff. Nos. 12-13.) Unbeknownst to Ivory-Peridot, Diamond's employees believed they had already fixed the technical problems of the self-checkout machine she had used. (Garnet Dep. at 7-8.) Garnet was skeptical of Ivory-Peridot's claim the machine had not printed a receipt. (Garnet Dep. at 5.)

Ivory-Peridot had purchased a gift card and gift bag between 2:00 and 2:10. (Aff. Nos. 4, 7, 10.) She had paid for her items at a self-checkout, but the machine malfunctioned and failed to print a receipt. (Aff. No. 9.) Instead of going to the customer service counter, Ivory-Peridot had decided to leave the store "because there was a long line" and she was in a hurry. (Aff. No. 9.) While walking toward the exit, she had dropped her cane and fallen when she had tried to pick it up. (Aff. No. 10.). When she fell, she had dropped her tote bag containing her purchased items beyond the store exit, causing the store's antishoplifting device to go off, which embarrassed her. (Aff. No. 10.)

Once Ivory-Peridot had stood up and told Garnet she had not received a receipt, Garnet suggested they “go somewhere private to talk about” the incident and asked Ivory-Peridot to come with her. (Garnet Dep. at 5.) They walked to the meeting room at the back of the store, where employees usually bring customers suspected of shoplifting. (Garnet Dep. at 5-6.) Garnet made some comments about Ivory-Peridot’s bag which she considered merely casual small talk, although Ivory-Peridot interpreted these remarks as sarcastic. (Garnet Dep. at 6; Aff. No. 14.) Because the meeting room was unexpectedly occupied, Garnet brought Ivory-Peridot to the next closest room, which was a sixty-four square-foot storeroom containing supplies, a stool, a surveillance camera, a full trash can, and an air vent with a small fan. (Garnet Dep. at 6.) It was hot and uncomfortable in the storeroom. (Moonstone Dep. at 7.) Ivory-Peridot did not want to be in the storeroom and waved her cane around, almost hitting Garnet and causing herself to become a little unsteady, prompting Garnet to touch her arm to give her physical support and to take the cane “for everyone’s protection.” (Garnet Dep. at 7.) Unknown to Garnet, Ivory-Peridot did not want to sit on the stool and decided to stand while she remained in the storeroom; also, Ivory-Peridot’s phone was dead. (Aff. No. 19.) Garnet then contacted the manager, Sterling Moonstone, about the incident and met him at the self-checkout machine about two minutes later. (Garnet Dep. at 7-8.) Garnet stayed at the checkout for twenty-five minutes while another employee fixed the machine, and Moonstone stayed with them until he was needed to help with a different customer at another checkout lane. (Garnet Dep. at 8.) Once another employee fixed the machine, Garnet informed Moonstone, and, following his instructions, returned to the storeroom to let Ivory-Peridot know Moonstone would be on his way. (*Id.*). Garnet reached the storeroom two minutes later and told Ivory-Peridot Moonstone would be with them soon, at which point she could leave. (*Id.*) Moonstone arrived at 2:50, explaining the machine’s malfunction to Ivory-

Peridot, apologizing to her, giving her a gift card, and returning her cane and purchased items. (Moonstone Dep. at 8.) The gift card was worth \$10.00. (Aff. No. 21.) The purchased items were worth around \$7.00. (Aff. No. 7.) Ivory-Peridot kept yelling after receiving an explanation, an apology, and a gift card from Moonstone and finally left at 2:55. (Moonstone Dep. at 8.)

ARGUMENT

The Court Should Grant Diamond Markets, Inc.’s Motion For Summary Judgment Because The Commonly Agreed Facts Show Diamond Detained Feldspar Ivory-Peridot Only After She Activated The Antishoplifting Device; Without Threatening Her, Harassing Her, Or Preventing Her From Contacting Others; And Only Long Enough To Investigate And Resolve The Issue, Proving The Grounds For Her Detention, Its Manner, And Its Duration Were Reasonable.

Ivory-Peridot’s triggering of Diamond’s clearly visible antishoplifting alarm system, as well as Diamond’s professional treatment of Ivory-Peridot and its timely resolution of the issue, demonstrate the reasonableness of Ivory-Peridot’s detention and its duration and manner. In federal court, summary judgment is appropriate when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56. Here, “the parties agree that there is no genuine dispute as to any material fact” (Pl.’s & Def.’s Joint Stipulation Facts, at 1.) Thus, the only question for the Court is whether the facts in the record show Diamond is entitled to defense from liability for false imprisonment.

Ivory-Peridot admits Diamond was a mercantile establishment that used antishoplifting devices in its store as defined by Ga. Code Ann. § 51-7-61(a). (West 2022). Thus, Diamond need only show by a mere preponderance of the evidence that, under the circumstances, (1) it had “reasonable cause” to detain Ivory-Peridot, and (2) it detained her “in a reasonable manner” and (3) “for a reasonable period of time” *Id.* § 51-7-61(b). It is undisputed Sapphire Garnet and Sterling Moonstone were Diamond’s agents and that Diamond detained Ivory-Peridot as defined

by Ga. Code Ann. § 51-7-20. (West 2022). Even when reading these remedial civil statutes broadly in favor of the plaintiff, as is required, the facts, along with ample persuasive authority, show Diamond’s actions were reasonable.

All three requirements are met here. First, Ivory-Peridot created reasonable grounds for Garnet to detain her by activating the antishoplifting system as she rushed to leave the store. Second, Garnet did not threaten, taunt, or otherwise intentionally mistreat Ivory-Peridot during her detention. Third, Ivory-Peridot was released as soon as Moonstone arrived to definitively resolve the issue, consistent with Diamond’s loss prevention protocols.

Because Diamond reasonably suspected Ivory-Peridot of shoplifting, did not target or harass her, and detained her only while resolving the issue, the Court should grant its Motion for Summary Judgment.

A. Because Feldspar Ivory-Peridot activated the antishoplifting device, Diamond Markets, Inc. had reasonable cause to detain her.

A store’s use of antitheft devices is a crucial factor in determining the reasonableness of its decision to detain a suspected shoplifter. According to Ga. Code Ann. § 51-7-61(b), an agent or employee of a mercantile establishment has “reasonable cause” to detain a person following “the automatic activation of [an antishoplifting] device as a result of a person exiting the establishment” (West 2022). Georgia case law is quite clear: a “[d]efendant’s right to detain is **lawful once the device is automatically activated.**” *Estes v. Jack Eckerd Corp.*, 360 S.E.2d 649, 652 (Ga. Ct. App. 1996) (emphasis added). In *Estes*, the store detained Estes after she left with a tag attached to an item, triggering the antishoplifting device. *Id.* at 650. Although Estes had paid for all her items and only triggered the alarm because a negligent employee had not deactivated the tag, the Court found the employee’s negligence “immaterial” and ruled the store had reasonable cause to detain Estes. *Id.* at 652. The only issues the court identified were

“whether the detention was made in a reasonable manner . . . and if proper notice was posted as required.” *Id.* On the latter point, the court concluded proper notice had been posted because “there were at least two warning signs prominently displayed in the store near the entrance and exit.” *Id.* Similarly, in *Mitchell v. Walmart Stores, Inc.*, the store detained Mitchell when a guard stopped her at the exit after she triggered an antitheft device because an employee had forgotten to remove a security code unit. 477 S.E.2d 631, 632 (Ga. Ct. App. 1996). Mitchell had not acted suspiciously, and the guard stopped her “solely in response to the alarm;” the Court confirmed this created “probable cause.” *Id.* at 632-33.

Like Estes and Mitchell, Ivory-Peridot activated the antishoplifting device despite having paid for her items. However, the triggering of the device is alone sufficient to create reasonable cause for detention when adequate notice is posted. Diamond posted signs notifying customers of its antitheft devices, and relevant case law indicates this is sufficient, regardless of whether the suspected shoplifter saw the signs (here, Ivory-Peridot claimed she had not). As other cases demonstrate, it also does not matter whether Ivory-Peridot had paid or whether she had left the store. Sapphire Garnet responded appropriately to the triggering of the alarm by investigating the possible shoplifting, and, because the self-checkout had not produced a receipt, Ivory-Peridot had no evidence of her innocence. Thus, Diamond had reasonable cause to detain Ivory-Peridot.

B. Because Sapphire Garnet neither threatened nor harassed Feldspar Ivory-Peridot nor prevented her from calling others on her phone, the manner of Diamond Markets, Inc.’s detention of Ivory-Peridot was reasonable.

The conduct of a store’s employees is critical to showing the manner in which it detained a customer was reasonable. Under Georgia law, a mercantile establishment is protected from liability for false imprisonment when “the manner of the detention . . . was **under all the circumstances reasonable.**” Ga. Code Ann. § 51-7-60(2) (West 2022) (emphasis added)

(amended May 2021). Georgia courts have interpreted this statutory language to mean a store must not “subject[] [suspected shoplifters] to gratuitous and unnecessary indignities.” *K Mart Corp. v. Adamson*, 386 S.E.2d 680, 682 (Ga. Ct. App. 1989). The qualifications of “gratuitous and unnecessary” reveal the importance of a case’s unique facts to a court’s determination of reasonableness. *Id.* Georgia courts have recognized that some indignities are necessary and permissible. In *Mitchell v. Walmart Stores, Inc.*, Mitchell’s embarrassment was an acceptable result of her detention, and the other facts of her detention—her not being touched by an employee and her not being accused of theft—made the detention’s manner reasonable. 477 S.E.2d 631, 633 (Ga. Ct. App. 1996).

Here, Ivory-Peridot’s embarrassment was an unavoidable result of the loud alarm, as was Garnet’s raising her voice. Her possible embarrassment from being recorded by the security camera in the storeroom also does not carry weight in evaluating the reasonableness of the detention’s manner, as *Mitchell* shows. Ivory-Peridot’s detention in an uncomfortable room was likewise necessary because the standard room used for detaining suspected shoplifters was in use. Diamond’s protocols lack a provision regarding what a security guard should do when the meeting room is busy; therefore, Garnet was forced to quickly decide where to bring Ivory-Peridot. Using her best judgment under the circumstances, she brought Ivory-Peridot to the storeroom because it was simply the closest room to the meeting room. Although Garnet touched Ivory-Peridot, she only did so to help her stand up after falling and to steady her after almost falling again. Garnet never accused her of theft. As other cases show, such behavior does not rise to the level needed to render the detention’s manner unreasonable.

In *Brown v. Super Discount Markets, Inc.*, Brown and Roper alleged a store security guard, when detaining them, “grabbed Brown’s arm and slung her and . . . slung Roper into a

nearby candy rack,” while the store disputed this, claiming “any touching was non-confrontational and privileged.” 477 S.E.2d 839, 840 (Ga. Ct. App. 1996). Brown and Roper also alleged the guard “pushed Brown down repeatedly . . . and poked her in the back as she was departing the store [and] threatened to . . . have Roper’s child taken away from her and . . . was profane and verbally abusive.” *Id.* In ruling the disputed facts precluded summary judgment, the court indicated the behavior Brown and Roper alleged would qualify as unreasonable, while the facts as presented by the store would have supported a finding of reasonableness. In *Jackson v. Kmart Corp.*, Jackson alleged similar treatment, claiming when the store manager questioned her about her involvement in a theft scheme in his office, he “told her he could make a pass at [her] and that there would be nothing [she] could do about it. In addition, the manager told [her] that he wished she was white, because, according to the manager, shoplifting always involved blacks.” 851 F. Supp. 469, 471 (M.D. Ga. 1994). Jackson also accused the manager of “refus[ing] to allow [her] to . . . call her husband and [telling her] ‘that he was going to keep her there until [she] told him . . . the truth.’” *Id.* at n.1. The Court concluded Jackson’s testimony was “sufficient to challenge the reasonableness of the manner in which she was detained” and could persuade a jury “that the actions of the manager subjected [her] to ‘gratuitous and unnecessary indignities.’” *Id.* at 474 (quoting *Adamson*, 386 S.E.2d at 682).

Garnet clearly treated Ivory-Peridot far more respectfully and appropriately than the store employees treated the plaintiffs in *Brown* and *Jackson*. Garnet did not accuse Ivory-Peridot of shoplifting. Garnet did not seize Ivory-Peridot’s phone. The only reason Ivory-Peridot could not call anyone during her detention is because her phone battery had died, and she did not ask Garnet for a charger or another phone to use. Garnet did not physically attack Ivory-Peridot—the physical contact she did make was benign and meant to be helpful. Garnet did not insult Ivory-

Peridot—though she made a few insensitive remarks, they were a far cry from the lewd insinuations and cruel taunts directed against the plaintiffs in *Brown* and *Jackson*. Garnet’s minor deviations from Diamond’s loss prevention protocols also do not make the manner of the detention unreasonable. In *Brown v. Winn-Dixie Atlanta, Inc.*, the court clarified that “[a]ny failure by store personnel to adhere to internal security guidelines would not demonstrate ‘unreasonableness’ in and of itself. [M]ore would be needed.” 389 S.E. 2d 530, 532 (Ga. Ct. App. 1989) (quoting *Luckie v. Piggly-Wiggly Southern*, 325 S.E.2d 844, 846 (Ga. Ct. App. 1984)). When examined in the context of the unique circumstances of this case, it is clear Garnet’s few departures from protocol, such as her running toward Ivory-Peridot, her touching Ivory-Peridot, and her taking Ivory-Peridot’s cane, mostly arose from Garnet’s concerns for Ivory-Peridot’s safety and the safety of Diamond’s supplies, and it is this context that deserves the most consideration. Thus, Garnet’s behavior and the conditions of Ivory-Peridot’s detention were justifiable and acceptable.

C. *The length of Feldspar Ivory-Peridot’s detention was reasonable because it took Diamond Markets, Inc. a long time to determine Ivory-Peridot’s innocence, and Diamond released her once it had fully resolved the possible shoplifting incident.*

Given the unique nature of each suspected shoplifting incident, whether a given detention’s duration is reasonable depends greatly on context. Ga. Code Ann. § 51-7-60(2) specifies that, for the owner of a mercantile establishment to be protected from liability, “the length of time during which [the] plaintiff was detained [must be] **under all the circumstances reasonable.**” (West 2022) (emphasis added) (amended May 2021). The statute’s emphasis on context is clear, and relevant case law reflects this focus. In *K Mart Corp. v. Adamson*, the store detained Adamson when a security officer escorted her to a back room and questioned her there for a disputed length of time. 386 S.E.2d 680, 681 (Ga. Ct. App. 1989). The court interpreted the

statute to require stores “not [to] subject[] [suspected shoplifters] to continued detention beyond that which is reasonable to ascertain the true facts” *Id.* at 682.

The *Adamson* standard was later applied in *Brown v. Super Discount Markets, Inc.*, where Brown and Roper claimed to have been detained by a security guard in an office for “between an hour and an hour and a half,” but the store claimed the detention lasted “approximately ten minutes.” 477 S.E.2d 839, 840 (Ga. Ct. App. 1996). The court held the dispute of fact was too great to allow summary judgment, reasoning that “whether the . . . length of detention [was] reasonable may be determined as a matter of law only in rare cases where the evidence is uncontroverted.” *Id.* Implicit in the court’s decision is an acknowledgement that, under the circumstances, a detention of ten minutes would likely have been reasonable while a detention of over an hour would have been unreasonable.

Here, Diamond detained Ivory-Peridot for forty-five minutes, which was approximately how long it took for Diamond to investigate and resolve the technical issue which precipitated Ivory-Peridot’s detention. Unlike *Brown*, where a dispute of fact precluded summary judgment, here, the parties agree on how long the detention lasted, meaning this case qualifies as one “where the evidence is uncontroverted” and the Court can determine the length of Ivory-Peridot’s detention was reasonable as a matter of law. *Id.* The uncontroverted evidence shows Diamond’s detention of Ivory-Peridot followed a clear timeline:

- 2:10: Ivory-Peridot triggered the antishoplifting device; Sapphire Garnet escorted her to the back of the store
- 2:15: Garnet contacted manager Sterling Moonstone and went to the self-checkout
- 2:17: Garnet met Moonstone at the self-checkout
- 2:17-2:42: Amethyst Topaz fixed the self-checkout machine

- 2:44: Garnet returned to the back of the store and told Ivory-Peridot Moonstone was on his way
- 2:50: Moonstone arrived at the back of the store, apologized to Ivory-Peridot, returned her purchased items, and gave her a \$10 gift card
- 2:55: Ivory-Peridot left the store with her \$7 of purchased items and the \$10 gift card

Releasing Ivory-Peridot before 2:44 would have been premature, and the additional time she was detained was required for Moonstone to briefly resolve a separate customer issue before clearing up Ivory-Peridot's case. Although Garnet could have explained the situation to Ivory-Peridot and permitted her to leave, Diamond's Loss Prevention Procedures explicitly called for "a security guard, the store manager, and/or an assistant manager [to] return the items to a shopper and apologize" when Diamond determined a detained shopper was innocent of shoplifting. (Moonstone Dep. Ex. 1, at 3.) Diamond's professional adherence to these procedures ensured Ivory-Peridot received a full explanation of the incident from an authority figure who was not directly involved in her detention and confirmed store management knew about and regretted Ivory-Peridot's unfortunate experience. Detaining Ivory-Peridot no longer than necessary to investigate her guilt, give her a full account of the facts, and apologize to and compensate her for her inconvenience was reasonable.

CONCLUSION

Because Defendant Diamond Markets, Inc.'s agents did not threaten or harass Plaintiff Feldspar Ivory-Peridot after she triggered the antitheft alarm system, nor detain her longer than necessary to professionally resolve the issue, Ivory-Peridot cannot prove Diamond acted unreasonably when it detained her on suspicion of shoplifting. Sapphire Garnet responded to the unique circumstances of the incident appropriately by bringing Ivory-Peridot to the nearest

available room once she saw the meeting room was busy and by immediately contacting the manager after detaining Ivory-Peridot. Diamond's actions must be judged in the context of the unique circumstances of this case. Both Diamond and Ivory-Peridot have agreed no material dispute of fact exists here; therefore, the facts show Diamond is entitled to judgment as a matter of law. Diamond respectfully requests the Court grant its Motion for Summary Judgment.

Respectfully submitted,

The 24th day of April, 2022.

/s/ William McCabe

William McCabe

Attorney for Defendant Diamond Markets, Inc.

OF COUNSEL:

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Applicant Details

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Applicant Education

BA/BS From	Princeton University
Date of BA/BS	June 2019
JD/LLB From	Georgetown University Law Center
	https://www.nalplawschools.org/employer_profile?FormID=961
Date of JD/LLB	May 19, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Georgetown Law Journal
Moot Court Experience	Yes
Moot Court Name(s)	National Energy & Sustainability Moot Court Competition

Bar Admission

Prior Judicial Experience

Judicial Internships/
Externships **Yes**
Post-graduate Judicial
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Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

MARGARET A. MCCALLISTER

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June 12, 2023

The Honorable Jamar Walker

Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

It is with great interest and enthusiasm that I submit this application for a 2024 clerkship in your chambers. I am a rising third-year law student at Georgetown University Law Center and a member of the *Georgetown Law Journal*.

I am confident that I could contribute meaningfully to your chambers. This past semester, I competed in the *West Virginia University Energy and Sustainability Moot Court Competition* on behalf of Georgetown Law's Appellate Advocacy team. I am proud to share that my team won the overall competition and earned second place for best brief. These accolades represent the countless hours of hard work spent learning the nuances of energy law, practicing techniques of oral argument, and brief writing. Next year, I have been selected to be a Law Fellow (teaching fellow for 1L legal writing) where I will work with first-year students on their legal writing while taking an advanced legal research and composition seminar.

I have attached my resume, writing sample, and law school transcript for your review. Professors Lisa Heinzerling, Paul Butler, Nicole Summers, and Sara Colangelo have submitted letters of recommendation on my behalf.

Thank you for your time and consideration. Please let me know if I can provide you with additional information.

Sincerely,
Margaret McCallister
Candidate for Juris Doctor 2024

MARGARET A. MCCALLISTER

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EDUCATION**GEORGETOWN UNIVERSITY LAW CENTER****Washington, D.C.***Juris Doctor*

Expected May 2024

Journal: *Georgetown Law Journal* – Executive Symposium Editor**GPA: 3.67**

Research Asst: Georgetown Climate Center (Spring 2022); Prof. Kristen Tiscione (2022), Prof. Sara Colangelo (2023)

Honors: WVU Energy & Sustainability Moot Court Competition 2023 Winner and Best Brief Runner Up;
Beaudry Moot Court Competition Semifinalist; Merit ScholarshipActivities: Law Fellow (2023-2024); Barristers' Council – *Appellate Advocacy Division*; Environmental Law Society**PRINCETON UNIVERSITY, SCHOOL OF ENGINEERING AND APPLIED SCIENCE****Princeton, NJ***Bachelor of Science in Engineering, cum laude*, in Civil and Environmental Engineering

June 2019

Honors: Society of Sigma Xi, Civil and Environmental Engineering Book Award

Activities: Mock Trial – *Captain*; Princeton Legal Journal (formerly Princeton Law Review) – *Managing Editor*;
Outdoor Action – *Leader Trainer*; Tiger Inn – *President*Thesis: *The Impact of Wildfire Emissions: Ozone Precursors and their Contribution to Ambient Pollution*

Presented Thesis to NASA Health and Air Quality Applied Sciences Team (HAQAST) in January 2019

EXPERIENCE**PERKINS COIE****Washington, D.C.***Summer Associate – Environment, Energy, and Resources Practice*

Summer 2023

RISING FOR JUSTICE, HOUSING ADVOCACY AND LITIGATION CLINIC**Washington, D.C.***Student Attorney*

Spring 2022

- Represented clients in D.C. Superior Court eviction proceedings including initial hearings, *Bell* hearings, mediation, and trial
- Prepared and filed motions including answers, motions to dismiss, reply briefs, applications to stay writs of restitution, and motions to proceed *in forma pauperis*

CLIMATE LEADERSHIP COUNCIL**Washington, D.C.***Extern*

Fall 2022

- Researched and analyzed international climate policy, focusing on solutions that leverage market forces

CALIFORNIA FIRST DISTRICT COURT OF APPEAL**San Francisco, CA***Judicial Intern to the Honorable Alison M. Tucher*

Summer 2022

- Prepared bench memoranda and draft judicial opinions after substantive legal research on matters before the court

ENVIRONMENTAL DEFENSE FUND**New York, NY***Carbon Pricing Analyst*

July 2019 – July 2021

- Worked collaboratively with 16 other expert teams in the Stanford Energy Modeling Forum 36 to assess climate policy in the wake of the Paris Agreement and future emissions trading strategies
- Developed an innovative modeling tool to derive a marginal abatement cost curves (MACCs) for every country separated by sector and gas to facilitate comparisons of counterfactual emissions trading scenarios

MPALA RESEARCH CENTER**Nanyuki, Kenya***Research Assistant*

Summer 2018

- Monitored the grazing behavior of livestock species in the field for study on husbandry strategies in rangeland vegetation

PUBLICATIONS

- Gökçe Akin-Olçum ... **Margaret McCallister**, et. al, *A Model Intercomparison of the Welfare Effects of Regional Cooperation for Ambitious Climate Mitigation Targets*, CLIM. CHANGE ECON. 2350009 (2022)
- **Margaret McCallister** et. al, *Forest Protection and Permanence of Reduced Emissions*, 5 FRONTIERS IN FORESTS & GLOB. CHANGE 1 (2022)
- **Margaret McCallister**, Rosalinda Medrano, & Janet Wojcicki, *Early Life Obesity Increases the Risk for Asthma in San Francisco Born Latina Girls*, 39 ALLERGY & ASTHMA PROC. 273 (2018)

INTERESTS

- Baking (especially Claire Saffitz recipes), Backpacking, Crosswords, Yoga, Piano

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 14, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Margaret McCallister as a law clerk. Maggie was a student in two of my courses at Georgetown Law. She received an "A" grade in each course. She engaged deeply with the curriculum and attended office hours often to discuss the nuances of the law, public policy rationales, and general thoughts about class discussion. In Criminal Law I selected Maggie to present on a topic that was both intellectually challenging and sensitive. She performed so well that I sent her an email after encouraging her to consider a career as a litigator.

Maggie is an incisive legal analyst and a first rate communicator. She holds an engineering degree from Princeton, and I suspect the critical thinking and analytical skills she learned there have benefitted her strong legal abilities. She has already published articles in scientific fields. Maggie recently assumed the position of Executive Symposium Editor of the prestigious Georgetown Law Journal. This also speaks to her excellent research and writing skills.

Maggie attended office hours very regularly, so I got to know her better than most students. She is a respectful, kind, and ambitious student with a great sense of humor. She is passionate about environmental justice, and I know she will have an extremely successful career as a lawyer. I think Maggie would be a spectacular law clerk, and a joy to have around chambers. I recommend her with great enthusiasm.

Sincerely,

Paul Butler
Albert Brick Professor in Law

Paul Butler - pdb42@georgetown.edu - (202) 662-9932

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing, with great enthusiasm and anticipation, to recommend Margaret McCallister for a judicial clerkship with you.

I know Maggie well. She took my course in Administrative Law as an elective in her first year of law school, and this past spring she was a student in my course in Environmental Law. In both classes, Maggie distinguished herself with her level of preparation, incisive comments, and intellectual curiosity. Maggie relishes thinking through complicated legal questions and doesn't rest until she, by her own lights, gets them right. In both Administrative Law and Environmental Law, Maggie was in a small study group of four students who regularly appeared at my doorstep, right on the dot, at the appointed time for my office hours. These students were so well prepared, and so eager to get to the bottom of the legal questions we had discussed in class, that, to be honest, I sometimes found myself stumped! When that occurred, we all happily consulted our statutes and cases, emerging with fresh collective understanding. For a teacher, such an experience is delightful.

In both of the courses she took with me, Maggie performed well on the final exams, earning an A- both times out. Her exams were notable, in particular, for their close parsing of statutory language and their effective deployment of relevant judicial decisions. Maggie's impressive research and writing skills are also evident in her successful performances in two moot court competitions and her selection as the symposium editor for our flagship journal, the *Georgetown Law Journal*.

Among law students, Maggie also stands out by virtue of her serene composure; she just never gets rattled. Maggie's self-possession may be, at least in part, a function of her experiences leading backpacking trips during her undergraduate years at Princeton. She participated in Princeton's "Outdoor Action" program before starting her freshman year, and she loved it so much that she went on to become the lead trainer for the students who led the trips – a leader for the leaders, if you will. Outdoor Action's freshman trips plunge incoming students – many of whom have essentially no experience in the outdoors, let alone experience backpacking – into intense six-day backcountry experiences. By her own account, in leading the freshman trips and eventually leading the leaders on training trips, Maggie developed her capacity to communicate with clarity and to lead collaboratively. While backpacking might seem far afield from serving as a law clerk, I am confident that Maggie's experiences in the outdoors give her a special kind of composure that will be invaluable in the high-stakes setting of judicial chambers.

I recommend Maggie McCallister to you without reservation. I hope these comments are helpful to you in considering Maggie's application for a clerkship. Please let me know if I can be of any further assistance.

Sincerely,

Lisa Heinzerling
Justice William J. Brennan, Jr. Professor of Law

Lisa Heinzerling - heinzerl@law.georgetown.edu

Georgetown Law
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June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is with great enthusiasm that I write this letter of recommendation on behalf of Margaret McCallister. Margaret's intelligence, commitment to public interest legal work, and genuine passion for litigation would make her a very valuable addition to your chambers.

Margaret is a very bright, thoughtful, and insightful law student, who is capable of digesting complex legal issues extremely well. Margaret came highly recommended for a Research Assistant position due to her excellent research and writing skills. I invited Margaret to become my Research Assistant this fall and have been thrilled with her work thus far.

In each assignment I have given Margaret, her research has been thorough and on-point, her legal writing well organized and structured, and her conclusions accurate. She is highly professional, delivering work on time if not early, and always completing a polished product that exceeds my expectations for a 2L student. Margaret's strong performance has also been consistent across all media; both her writing and oral presentation are excellent. Her reputation for high quality, timely, and professional work are well known to Margaret's peers on her law journal as well. From their remarks, I understand her to be well respected by her colleagues and a strong collaborator with them on the journal.

Finally, Margaret's resume of experience evinces her thorough commitment to public service and litigation. Through her rigorous academics and practical experiences, Margaret is very well prepared for a clerkship. She would make an excellent addition to your staff, and I strongly recommend you consider her candidacy.

Please let me know if I can be of further assistance or answer any additional questions.

Sincerely,

/s/ SARA A. COLANGELO

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June 10, 2023

The Honorable Jamar Walker
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Dear Judge Walker:

I write this letter to offer my strongest recommendation for Margaret McCallister's clerkship candidacy. I am an Associate Professor of Law at Georgetown University Law Center, and I had the pleasure of teaching Ms. McCallister during her 2L year in my Housing Law and Policy seminar. She is one of the most thoughtful, intelligent, and hard-working students I have ever taught, and I cannot recommend her highly enough.

Housing Law and Policy is a 20-student elective seminar offered to students in their second and third years at Georgetown Law. Participation in the seminar is on a volunteer-only basis, and students are evaluated primarily based on a final research paper, along with the quality and quantity of their class participation.

Ms. McCallister excelled in every aspect of her work in the seminar. Her final paper, which she chose to write on the issue of homelessness among youth who "age-out" of the foster care system, was among the top two best papers in the class. First and foremost, the quality of her writing is excellent. She writes clearly, persuasively, and with careful attention to detail and word choice. Her research on the topic was also extremely thorough. She used a variety of sources and dug deep into the legal questions at issue. She was also the only student in the class who – on her own initiative – conducted original research by interviewing stakeholders and policymakers. In her final paper she addressed counterarguments, proposed creative reforms grounded in her research findings, and weaved together historical, legal, and political perspectives. Ms. McCallister's outstanding work earned her an "A" grade for the paper and class.

Ms. McCallister's approach to writing the paper also demonstrates her excellent work ethic. Beginning early in the semester, she came to office hours to discuss possible topics and think through ways to narrow her focus once she settled on the topic of youth homelessness. As far as I am aware, she started her research earlier than anyone in the class. She then continued to meet with me regularly to seek out guidance on research strategies, ensure she was taking the paper in the right direction, and talk through her ideas for policy reforms. Throughout our multiple conversations, I witnessed not only her highly disciplined nature, but also her ability to immerse herself in research and her deep intellectual curiosity.

I offer students the option of submitting a first draft for feedback prior to submitting the final draft of their paper. Ms. McCallister was one of only two students who took advantage of this option, again demonstrating her extraordinary discipline and excellent work ethic. She was very receptive to the feedback I provided and incorporated it meticulously. She also met with me again in office hours to ensure that she understood my comments. This experience highlighted for me many qualities of Ms. McCallister that would make her an excellent law clerk: she works ahead of schedule, seeks out feedback, and incorporates it well. I was so impressed with Ms. McCallister's research and writing skills as well as her work ethic that I offered her the opportunity to work as my research assistant after the semester ended. Unsurprisingly (but disappointing to me), she had already been hired by another professor who was similarly impressed by her work.

Ms. McCallister also came to every class extremely well-prepared. On dimensions of both quality and quantity, her participation was at the very top of the class. Her comments were thoughtful, nuanced, and reflected careful reading of the assigned material. She also often connected themes across multiple discrete course topics and classes, demonstrating deep understanding of the material. She was the student whose hand I was always delighted to see raised – she posed insightful questions that pulled the class conversation in novel and exciting directions.

Finally, Ms. McCallister was a true pleasure to have as a student. She is warm, upbeat, and bursting with intellectual energy. She is reflective and continually sought out feedback to improve her work. I have no doubt that she will be a positive presence in chambers and will approach the role with enthusiasm, energy, and a high degree of professionalism.

I recommend Ms. McCallister with the absolute highest level of support and without any reservation. As a former law clerk myself, I think Ms. McCallister displays all the qualities necessary to excel in the role – she is extremely bright, hard-working, and meticulous. If you have any questions or would like to discuss Ms. McCallister's candidacy further, please do not hesitate to contact me at ns1368@georgetown.edu or (847) 644-5808.

Sincerely,

Nicole Summers
Associate Professor of Law

Nicole Summers - nicole.summers@georgetown.edu

MARGARET A. MCCALLISTER

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The attached writing sample is the case comment I drafted for Georgetown's *Write-On Competition*. For the 2022 *Write-On Competition*, competitors were limited to only select provided materials while writing the case comment. The 2022 competition provided competitors with 216 pages of cases, statutes, and commentary for analysis. Competitors were allotted two weeks to independently complete both the case comment and Bluebooking exam for consideration for admission to a Journal. I am proud to share that the combination of this case comment, my Bluebooking exam, and my personal statements secured me a position on the *Georgetown Law Journal*.

The case comment was limited to 7 pages of text and 3 pages of endnotes. This 10-page writing sample includes the facts of the case, the case holding, a roadmap explaining the structure of the comment, analysis, and a conclusion; nothing was redacted for the purposes of this writing sample.

**Strained Reasoning: Why the Tenth Circuit was Wrong
to Account for Subjective Intent in *Strain v. Regalado***

I. Introduction

A. Statement of Facts

Thomas Pratt was booked into Tulsa County Jail to await trial on December 11, 2015.¹ The following morning, Pratt informed prison officials that he was experiencing alcohol withdrawal symptoms and requested medication for his detoxification.² A nurse from Armor Correctional Health Services performed a drug and alcohol withdrawal assessment during which Pratt stated that he “habitually drank fifteen-to-twenty beers per day for the past decade.”³ Pratt was admitted to the jail’s medical unit for a mental health assessment and monitoring.⁴

While under observation on December 13, Pratt was placed “on seizure precautions, which dictated that staff check his vital signs every eight hours” and was prescribed Librium for his symptoms.⁵ During an early morning withdrawal assessment on December 14, Nurse Patricia Deane observed deteriorating symptoms in Pratt, including vomiting, panic attacks, disorientation, and severe tremors, but did not take Pratt’s vital signs as was mandated by the seizure precautions.⁶ After Deane, another nurse attempted to take Pratt’s vital signs, but “could not do so because he would not sit still.”⁷ Pratt was later switched from the Librium prescription to a Valium prescription, the first dose of which he took later that day.⁸

Later that morning, Dr. Curtis McElroy examined Pratt, during which he noticed a pool of blood in Pratt’s cell and observed that Pratt was disoriented and had a gash on his forehead.⁹ Later that day, a third nurse noted that Pratt “needed assistance with daily living activities.”¹⁰ On December 15, Kathy Loehr evaluated Pratt’s mental health in her capacity as a licensed professional counselor (LPC) and noted both the “unintentional” cut on his forehead and that Pratt was shaky and struggled to answer her questions.¹¹ That afternoon when Dr. McElroy returned to assess Pratt

a second time, Dr. McElroy found Pratt “underneath the sink in his cell” and again noted the cut on Pratt’s forehead.¹²

Around midnight on December 16, an additional Armor nurse saw Pratt, but failed to check his vital signs because “he would not get up.”¹³ An hour later, an officer called for aid upon finding Pratt “motionless on his bed.”¹⁴ The responding nurse initiated cardiopulmonary resuscitation (CPR) and “called a medical emergency.”¹⁵ First responders resuscitated Pratt and rushed him to the hospital.¹⁶ Hospital officials determined that Pratt had gone into cardiac arrest and discharged him with “a seizure disorder and other ailments” leaving him permanently disabled.¹⁷ Pratt’s guardian, Faye Strain, filed suit under 42 U.S.C. § 1983 and Oklahoma state law against defendants Nurse Deane, Dr. McElroy, LPC Loehr, and Tulsa County Sheriff Regalado, alleging the defendants were deliberately indifferent to Pratt’s serious medical needs.¹⁸ The district court dismissed Strain’s federal law claims and declined to exercise supplemental jurisdiction over Strain’s state law claims, which Strain appealed.¹⁹

B. Holding

The Tenth Circuit Court of Appeals affirmed the district court’s ruling that the defendants did not act with deliberate indifference in their medical treatment of Pratt.²⁰ Writing for the court, Judge Carson held that a pretrial detainee’s claim for deliberate indifference is governed by both an objective and subjective standard.²¹ The court acknowledged and dismissed the Supreme Court’s holding in *Kingsley v. Hendrickson*, construing the language of *Kingsley* to apply only to acts of excessive force and not to claims of deliberate indifference to serious medical needs.²² While the parties conceded that Pratt exhibited an objectively serious medical need,²³ the court held that Strain’s allegations of deliberate indifference to a serious medical need were unsupported by sufficient facts.²⁴

C. Roadmap

The Tenth Circuit was correct in deciding that the defendants were not deliberately indifferent to Pratt's serious medical needs; however, the court erred in holding that a subjective prong is necessary to the test for deliberate indifference. This comment argues that the Supreme Court provided clear signals that the standard for pretrial detainees' Fourteenth Amendment claims is distinct from that for inmates' Eighth Amendment claims. This comment also argues that the Tenth Circuit ignored its own precedent and Supreme Court precedent in error when applying a subjective prong for deliberate indifference. Lastly, this comment argues that it was unnecessary to consider the subjective component at all because the defendants' actions were not deliberately indifferent even under the lower bar of an objective standard.

II. Analysis

A. *Farmer v. Brennan* implicitly distinguished between Eighth Amendment claims by inmates and Fourteenth Amendment claims by pretrial detainees.

Inmates may sue prison officials for cruel and unusual punishment under the Eighth Amendment, but pretrial detainees look to the Fourteenth Amendment's Due Process Clause for relief.²⁵ The Court's language in *Farmer v. Brennan* carefully defined "deliberate indifference" as "requiring a showing that the official was subjectively aware of the risk," and deemed this standard to "comport[] best with the text of the [Eighth] Amendment as [the Court's] cases have interpreted it."²⁶ This subjective prong has been interpreted as a "*mens rea* prong."²⁷ To satisfy the subjective component, a plaintiff must produce evidence that the defendant "actually (subjectively) kn[ew] that an inmate [faced] a substantial risk of serious harm."²⁸

Because the due process rights of a pretrial detainee are "at least as great as the Eighth Amendment protections available to a convicted prisoner,"²⁹ after *Farmer*, lower courts indiscriminately applied a subjective deliberate indifference test to both inmates and pretrial detainees in assessing their § 1983 claims against prison officials.³⁰ The Seventh Circuit called the

distinction between prisoners' claims and pretrial detainees' claims "immaterial since the legal standard for a § 1983 claim is the same."³¹ The Eleventh Circuit similarly noted that "the distinction is unimportant... because this Court has said that 'the minimum standard for providing medical care to a pre-trial detainee under the Fourteenth Amendment is the same as the minimum standard required by the Eighth Amendment for a convicted prisoner.'"³² However, in *Farmer*, Justice Blackmun in concurrence identified the "source of the intent requirement" as "the Eighth Amendment itself."³³ Moreover, Justice Souter's majority opinion in *Farmer* stated that § 1983 claims "merely provide[] a cause of action, 'contain[ing] no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right.'"³⁴ The Court took great care to discuss the subjective prong of the deliberate indifference test only as applied to Eighth Amendment claims. The lower courts' application of the subjective prong to pretrial detainee Fourteenth Amendment claims went beyond the mandate of *Farmer* and failed to acknowledge the fundamental differences between the causes of action, which the Court addressed in *Kingsley v. Hendrickson*.³⁵

B. The Tenth Circuit's treatment of *Kingsley* contravenes its own precedent and should be resolved in favor of an objective test.

In *Kingsley*, the Court explained, "[t]he language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'"³⁶ Though the *Kingsley* Court declined to decide the question of what standard should govern the mistreatment of pretrial detainees,³⁷ this statement evidences that there is not a unilateral subjective standard for due process claims by pretrial detainees.³⁸ Circuits are split on the question of whether to apply an objective or subjective standard. The Second, Seventh, and Ninth Circuits favor an objective test for deliberate indifference.³⁹ While the Fifth, Eighth, and Eleventh Circuits join the Tenth Circuit in requiring subjective intent as part of the deliberate indifference calculus, each of those circuits relegates their discussion of *Kingsley* to a footnote; they each acknowledge that *Kingsley* may apply, but cabin their

holdings to excessive force claims.⁴⁰ *Strain* is the first case interpreting *Kingsley* in which the majority affords *Kingsley* a discussion in the text of the opinion and yet holds that a subjective prong is essential to the test for deliberate indifference.

However, in the *Strain* opinion, the Tenth Circuit relies on its precedent that either predates *Kingsley* or declined to address the case altogether.⁴¹ Though the Tenth Circuit had previously applied *Kingsley* in *Colbruno v. Kessler* “against law enforcement officers who *punished* a pretrial detainee,”⁴² the court’s opinion in *Strain* attempts to distinguish *Colbruno* by differentiating punishment and inadequate medical care.⁴³ But, the Tenth Circuit concedes that “punishment is a condition of confinement,”⁴⁴ and, in *Wilson v. Seiter*, the Supreme Court stated that there was “no significant distinction between claims alleging inadequate medical care and those alleging inadequate ‘conditions of confinement.’”⁴⁵ The Tenth Circuit’s distinction is thus illusory. If both punishment and medical care are conditions of confinement, the same standard should be applied to claims alleging a due process violation of either. If the standard for punishment is objective in the Tenth Circuit, so too should the standard for deliberate indifference be objective.

C. The Tenth Circuit’s treatment of *Kingsley* is also inconsistent with Supreme Court precedent, which favors an objective standard for pretrial detainees.

The inclusive language of *Kingsley* should be read as applying to all claims by pretrial detainees, not just claims of excessive force. The Tenth Circuit argues that the Supreme Court “has never suggested that we should remove the subjective component for claims addressing inaction.”⁴⁶ Yet, the *Kingsley* Court held generally with regard to “the challenged governmental action” and not specifically to excessive force.⁴⁷ While the Tenth Circuit argues that *stare decisis* precludes using a purely objective standard for deliberate indifference, citing *R.A.V. v. City of St. Paul* and *Agostini v. Felton*, these cases stand only for the proposition that the court may not contravene Supreme Court decisions, and not that the Tenth Circuit is prohibited from interpreting a decision as applicable to cases the Supreme Court has not squarely addressed.⁴⁸

The Tenth Circuit's opinion heavily relies on *Farmer* but ignores the contours of its holding. In *Farmer*, Justice Souter explained that the Court's prior decision in *Wilson v. Seiter* cited cases that applied an objective standard to deliberate indifference claims "for the proposition that the deliberate indifference standard applies to all prison-conditions claims, not to undo its holding that the Eighth Amendment has a 'subjective component.'"⁴⁹ Further, in *Bell v. Wolfish*, the Court applied an "objective standard to evaluate a variety of prison conditions" and "did not consider the prison officials' subjective beliefs."⁵⁰ Respecting the mandate of *stare decisis* requires that circuit courts follow the precedents of *Wilson* and *Bell* and an objective standard be applied to evaluate prison conditions, including medical care.

Further, to advance its argument of requiring subjective intent in assessing deliberate indifference, the court uses siloed dictionary definitions to attribute meaning to the words "deliberate" and "indifference."⁵¹ In doing so, it disregarded the Supreme Court's clear statement that the "decision that Eighth Amendment liability requires consciousness of a risk is thus based on the Constitution and our cases, not merely on a parsing of the phrase 'deliberate indifference.'"⁵² The Tenth Circuit's attempts to attribute specific meaning to words the Court has held are ambiguous contravenes the very precedent the Tenth Circuit relies on.⁵³

D. It was unnecessary to consider the defendants' subjective intent because, while possibly negligent, the defendants were not deliberately indifferent to Pratt's serious medical need under the lower threshold of an objective standard.

Even under an objective standard, the defendants cannot be held deliberately indifferent to Pratt's medical needs. Whether the defendants were deliberately indifferent depends on whether they acted in an objectively reasonable manner.⁵⁴ Deliberate indifference is found "between the poles of negligence at one end and purpose or knowledge at the other,"⁵⁵ but "mere negligence" does not give rise to a claim of deliberate indifference.⁵⁶ As in *Swain v. Junior*, both parties acknowledged a serious medical need existed, but disagreed on "the adequacy of the jail's response,"

which is “where the substance of the court’s decision ultimately lies.”⁵⁷ Here, the substance of the court’s decision in *Strain* can be determined without reaching a subjective test.

While the staff at Tulsa County Jail may have provided ineffective treatment to Pratt and underestimated the nature of his medical needs, they did provide him with medical care.⁵⁸ Upon discovering Pratt in medical distress, he was *rushed* to the hospital.⁵⁹ There was no undue delay in his care once the extent of his condition was realized. According to the Eleventh Circuit, which continues to apply a subjective standard post-*Kingsley*, while a “failure to diagnose can be deemed extremely negligent, it does not cross the line to deliberate indifference.”⁶⁰ Moreover, the Seventh Circuit, which follows the objective test post-*Kingsley*, has held that a prison official was not deliberately indifferent in “failing to monitor a detainee’s vitals for signs of *delirium tremens*.”⁶¹ Even the Tenth Circuit itself has held that the “negligent failure to provide adequate medical care, even one constituting medical malpractice, does not give rise to a constitutional violation.”⁶² At most, the defendants are guilty of failing to take Pratt’s vitals in violation of protocol and failing to recognize signs of *delirium tremens*.⁶³ Regardless of whether an objective or subjective standard is applied, these alleged actions are merely negligent and are not deliberately indifferent under an objective or subjective standard.

III. Conclusion

While the Tenth Circuit correctly found that the defendants in *Strain v. Regalado* were not deliberately indifferent, it was incorrect to apply a subjective intent standard in assessing deliberate indifference to a serious medical need. In the wake of *Kingsley v. Hendrickson*, the appropriate test for deliberate indifference to serious medical needs is objective.

¹ *See Strain v. Regalado*, 977 F.3d 984, 987 (10th Cir. 2020).

² *See id.*

³ *Id.* at 987.

⁴ *See id.*

⁵ *Id.* at 987–88.

⁶ *Id.* at 988.

⁷ *See id.* at 997 n.3.

⁸ *See id.* at 988.

⁹ *See id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *See id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See id.*

¹⁷ *Id.*

¹⁸ *Id.* (“Plaintiff alleged that Mr. Pratt’s symptoms showed he was suffering from *delirium tremens*.”)

¹⁹ *Id.*

²⁰ *See id.* at 987.

²¹ *See id.* at 989 (citing *Clark v. Colbert*, 895 F.3d 1258, 1267 (10th Cir. 2018)).

²² *See id.* at 990–91.

²³ *See id.* at 997 n.7.

²⁴ *See id.* at 997.

²⁵ See *Castro v. Cnty. of L.A.*, 833 F.3d 1060, 1067–68 (9th Cir. 2016) (citing *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)); see also U.S. CONST. art. XIV, § 1, cl. 2.

²⁶ See *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

²⁷ *Darnell v. Pineiro*, 849 F.3d 17, 29 (2017).

²⁸ *Caldwell v. Warden, FCI Talladega*, 748 F.3d 1090, 1099 (2014) (citing *Rodriguez v. Sec’y for Dep’t of Corr.*, 508 F.3d 611, 617 (11th Cir. 2007)).

²⁹ See 833 F.3d at 1067 (citing *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)).

³⁰ See *id.* at 1068.

³¹ See *Whiting v. Marathon Cnty. Sheriff’s Dep’t*, 382 F.3d 700, 703 (7th Cir. 2004).

³² See *Burnette v. Taylor*, 533 F.3d 1325, 1333 n.4 (11th Cir. 2008) (citing *Lancaster v. Monroe Cnty.*, 116 F.3d 1419, 1425 n.6 (11th Cir. 1997)).

³³ See *Farmer v. Brennan*, 511 U.S. 825, 854 (1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 300 (1991)).

³⁴ See *id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 330 (1986)).

³⁵ See *Kingsley v. Hendrickson*, 576 U.S. 389 (2015).

³⁶ See *id.* at 400–401 (citing *Ingraham v. Wright*, 430 U.S. 651, 671–672 & n.40 (1977)).

³⁷ *Id.* at 396.

³⁸ See *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 424 (5th Cir. 2017) (Graves, J. concurring).

³⁹ See *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017); *Miranda v. Cnty. of Lake*, 900 F.3d 335 (7th Cir. 2018); *Castro v. Cnty. of L.A.*, 833 F.3d 1060 (9th Cir. 2016).

⁴⁰ See *Alderson*, 848 F.3d at 419 n.4; *Whitney v. City of St. Louis, Mo.*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Dang ex rel. Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017); *Davies v. Israel*, 342 F.Supp.3d 1302, 1310 n.5 (S.D. Fla. 2018).

⁴¹ See *Strain v. Regalado*, 977 F.3d 984, 990–91 (10th Cir. 2020) (citing *Clark v. Colbert*, 895 F.3d 1258, 1269 (10th Cir. 2018)).

⁴² See *id.* at 997 n.6 (citing *Colbruno v. Kessler*, 928 F.3d 1155, 1163 (10th Cir. 2019)).

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018) (citing *Wilson v. Seiter*, 501 U.S. 294, 303 (1991)).

⁴⁶ See *Strain*, 977 F.3d at 992 (citing *Castro v. Cnty. of L.A.*, 833 F.3d 1060, 1086 (9th Cir. 2016) (Ikuta, J., dissenting)).

⁴⁷ *Castro*, 833 F.3d at 1070 (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 938 (2015)).

⁴⁸ See *Strain*, 977 F.3d at 993 (first citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997); then citing *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 n.5 (1992)).

⁴⁹ See *Farmer v. Brennan*, 511 U.S. 825, 839 (1994) (citing *Wilson*, 501 U.S. at 298) (emphasis added).

⁵⁰ See *Kingsley v. Hendrickson*, 576 U.S. 389, 398 (2015) (citing *Bell v. Wolfish*, 441 U.S. 520, 541–543 (1979)).

⁵¹ See *Strain*, 977 F.3d at 992.

⁵² See *Kingsley*, 576 U.S. at 826.

⁵³ See *id.* at 840.

⁵⁴ See *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015) (“[O]bjective reasonableness turns on the ‘facts and circumstances of each particular case.’” (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989))).

⁵⁵ *Strain v. Regalado*, 977 F.3d 984, 992–93 (10th Cir. 2020) (citing *Farmer*, 511 U.S. at 835).

⁵⁶ *Farmer*, 511 U.S. at 835 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

⁵⁷ See Recent Case, *Swain v. Junior*, 961 F.3d 1276 (11th Cir. 2020), 134 HARV. L. REV. 2622, 2624–25 (2021).

⁵⁸ *Strain*, 977 F.3d at 987.

⁵⁹ *Id.*

⁶⁰ See *McElligott v. Foley*, 182 F.3d 1248, 1256–57 (11th Cir. 1999).

⁶¹ See 977 F.3d at 994 (citing *Collins v. Al-Shami*, 851 F.3d 727, 731–32 (7th Cir. 2017)).

⁶² *Id.* at 994 (citing *Perkins v. Kan. Dep’t of Corr.*, 165 F.3d 803, 811 (10th Cir. 1999)).

⁶³ See *Strain*, 977 F.3d at 988.

Applicant Details

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Applicant Education

BA/BS From	University of Virginia
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Date of JD/LLB	May 22, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Journal of Legislation and Public Policy
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	No
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Sexton, John
john.sexton@nyu.edu
212-992-8040

Sharkey, Catherine
catherine.sharkey@nyu.edu
212-998-6729

Liebman, James S.
jliebman@law.columbia.edu
212-854-3423

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Robert McCarthy
36 Locust Street
Garden City, NY 11530

June 12, 2023

The Honorable Jamar Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a second-year student at New York University School of Law and an Executive Editor for the *Journal of Legislation and Public Policy*. I am writing to apply for a 2024 - 2025 term clerkship in your chambers.

Enclosed are my resume, law school, graduate school, and undergraduate transcripts. Additionally, I have submitted an unedited writing sample. Professors Jim Liebman, John Sexton, and Catherine Sharkey wrote letters of recommendation in my support.

If there is any other information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

Robert McCarthy

ROBERT THOMAS MCCARTHY
36 Locust St., Garden City, New York 11530
(516) 510-6673; rm6082@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, New York

Candidate for J.D., May 2024

Honors: *Journal of Legislation and Public Policy*, Executive Editor

Activities: Student Bar Association, Senator
Law Revue, Actor, Writer, and Producer
Parole Preparation Project, Student Advocate

UNIVERSITY OF NOTRE DAME, Notre Dame, Indiana

M.Ed., May 2020

UNIVERSITY OF VIRGINIA, Charlottesville, Virginia

B.A. in Leadership & Public Policy, Religious Studies, May 2018

Honors: Graduation Speaker, Dean's List

Activities: Batten Undergraduate Council, President

EXPERIENCE

KING & SPALDING LLP, New York, NY

Summer Associate, Summer 2023

Participate in all aspects of complex commercial litigation and international arbitration, including research for a motion in limine and a motion to dismiss. Research includes projects on product liability; contributory infringement of pharmaceutical drugs; and enforcement of arbitral awards under New York Convention. Actively sought out and prioritized pro bono matters.

CENTER FOR PUBLIC RESEARCH AND LEADERSHIP, New York, NY

Graduate Student Associate, Fall 2022

Participated in all aspects of writing a report assessing Delaware's implementation of high-quality instructional materials on students' learning. Facilitated over 20 interviews with educators, conducted 10 teacher observations, researched education law, and wrote and edited final report distributed throughout Delaware.

PROFESSOR CATHERINE SHARKEY, NYU SCHOOL OF LAW, New York, NY

Research Assistant & Teaching Assistant, June 2022 – March 2023

Researched, substantiated, and edited Prof. Sharkey's book review of *Tort Law and the Construction of Change for Virginia Law Review*. Collaborated with Prof. Sharkey to revise syllabus and lead seven review sessions.

PROFESSOR CATHERINE SHARKEY, NYU SCHOOL OF LAW, New York, NY

Research Assistant, June 2022 – February 2023

Conducted extensive legal research in civil procedure; updated Wright & Miller's Federal Practice and Procedure treatise 14AA (Amount in Controversy).

NASSAU COUNTY LEGISLATURE, Garden City, NY

Candidate for County Legislature – Legislative District 14, March 2021 – November 2021

Developed detailed policy proposals including on community safety. Raised over \$20,000 from 200 donors. Knocked on 3,750 doors. Appeared on two national podcasts to discuss my experiences and civility in politics.

CATHEDRAL SCHOOL OF THE ANNUNCIATION, Stockton, CA

Third Grade Teacher, August 2018 – May 2021

Earned Master's in education while serving as a full-time teacher. Presented at Advancing Improvements in Education, a national conference, to over 30 teachers on how to best empower students living with trauma.

ADDITIONAL INFORMATION

Studied post-genocide peace building in Kigali, Rwanda (January – May 2016). Enjoy marathon running (kind of), baking, biking, and liberation theology.

Name: Robert McCarthy
 Print Date: 06/04/2023
 Student ID: N19720211
 Institution ID: 002785
 Page: 1 of 1

**New York University
 Beginning of School of Law Record**

Fall 2021

School of Law Juris Doctor Major: Law				
Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor:	Colleen P Campbell			
Criminal Law		LAW-LW 11147	4.0	B
Instructor:	Randy Hertz			
Procedure		LAW-LW 11650	5.0	B
Instructor:	Arthur R Miller			
Contracts		LAW-LW 11672	4.0	B-
Instructor:	Kevin E Davis			
1L Reading Group		LAW-LW 12339	0.0	CR
Instructor:	John Sexton			
		<u>AHRS</u>	<u>EHRS</u>	
Current		15.5	15.5	
Cumulative		15.5	15.5	

Spring 2022

School of Law Juris Doctor Major: Law				
Constitutional Law		LAW-LW 10598	4.0	B
Instructor:	Melissa E Murray			
Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor:	Colleen P Campbell			
Legislation and the Regulatory State		LAW-LW 10925	4.0	B+
Instructor:	Adam M Samaha			
Torts		LAW-LW 11275	4.0	A
Instructor:	Catherine M Sharkey			
1L Reading Group		LAW-LW 12339	0.0	CR
Instructor:	John Sexton			
Financial Concepts for Lawyers		LAW-LW 12722	0.0	CR
		<u>AHRS</u>	<u>EHRS</u>	
Current		14.5	14.5	
Cumulative		30.0	30.0	

Fall 2022

School of Law Juris Doctor Major: Law				
Teaching Assistant		LAW-LW 11608	2.0	CR
Instructor:	Catherine M Sharkey			
Education Sector Policy and Consulting Clinic		LAW-LW 12446	7.0	A
Instructor:	James S Liebman			
Education Sector Policy and Consulting Clinic Seminar		LAW-LW 12447	7.0	A
Instructor:	James S Liebman			
		<u>AHRS</u>	<u>EHRS</u>	
Current		16.0	16.0	
Cumulative		46.0	46.0	

Spring 2023

School of Law Juris Doctor Major: Law				
Colloquium on Law, Economics and Politics of Urban Affairs: Writing Credit		LAW-LW 10321	1.0	A-
Instructor:	Vicki L Been			
Colloquium on Law, Economics and Politics of		LAW-LW 10634	2.0	A-

Urban Affairs

Instructor:	Vicki L Been			
Antitrust Law		LAW-LW 11164	4.0	B
Instructor:	Christopher Jon Sprigman			
Property		LAW-LW 11783	4.0	B
Instructor:	David Jerome Reiss			
Business Torts: Defamation, Privacy, Products and Economic Harms		LAW-LW 11918	4.0	B+
Instructor:	Catherine M Sharkey			
		<u>AHRS</u>	<u>EHRS</u>	
Current		15.0	15.0	
Cumulative		61.0	61.0	
Staff Editor - Journal of Legislation & Public Policy 2022-2023				

End of School of Law Record

Robert Thomas McCarthy

06/09/2023

Degrees Conferred

Confer Date: 05/20/2018
Degree: Bachelor of Arts
Degree Honors: with High Distinction
Major: Public Policy and Leadership
Major: Religious Studies

BIOL	1050	Genes and Citizens	A	3.0
COLA	1500	College Advising Seminars	A	1.0
Course Topic:		Varieties of Relg Experience		
PSYC	1010	Introductory Psychology	B	3.0
RELG	1010	Intro Western Religious Trads	A	3.0
Curr Credits	14.0	Grd Pts	51.800	GPA 3.700
Cuml Credits	14.0	Grd Pts	51.800	GPA 3.700

Test Credits

Test Credits Applied Toward Arts & Sciences Undergraduate

Transferred to Term	2014 Fall as				
ENWR	1510	Accelerated Academic Writing	TE	0.00	
Test Credit Total:				0.00	

2015 Spring
School: College & Graduate Arts & Sci
Major: Arts & Sciences Undeclared

EDIS	2010	Teaching as a Profession	A	3.0
EDIS	2880	Field Experience	S	1.0
ENGL	3820	History of Lit in English II	B+	3.0
FREN	1050	Accelerated Elementary French	A-	4.0
PLAN	3860	Cities and Nature	A-	3.0
RELC	2460	Spirit of Catholicism	A	3.0
Curr Credits	17.0	Grd Pts	59.800	GPA 3.738
Cuml Credits	31.0	Grd Pts	111.600	GPA 3.720
Honor:		Dean's List		

Transfer Credits

Transfer Credit from SIT Study Abroad
Applied Toward Arts & Sciences Undergraduate Program

Incoming Course					
AFRS	3000	National & Ethnic Identity			
Transferred to Term	2016 Spring as				
ANTH	3000T	Non-UVa Transfer/Test Credit	TR	3.00	

2015 Fall
School: College & Graduate Arts & Sci
Major: Arts & Sciences Undeclared

BIOL	1210	Human Biology and Disease	A	3.0
ECON	2010	Principles of Econ: Microecon	C+	3.0
FREN	2010	Intermediate French I	A-	3.0
PSYC	2600	Intro to Social Psychology	A-	3.0
RELC	3804	Amer. Catholic Social Thought	A	3.0
Curr Credits	15.0	Grd Pts	53.100	GPA 3.540
Cuml Credits	46.0	Grd Pts	164.700	GPA 3.660
Honor:		Dean's List		

Incoming Course					
PEAC	3000	Post Genocide Restor Peace Bld			
Transferred to Term	2016 Spring as				
PLIR	3000T	Non-UVa Transfer/Test Credit	TR	3.00	

2016 Spring
School: College & Graduate Arts & Sci
Major: Religious Studies

ZFOR	3512	International Study	N	0.0
Course Topic:		External Transfer		
Curr Credits	0.0	Grd Pts	0.000	GPA 0.000
Cuml Credits	46.0	Grd Pts	164.700	GPA 3.660

Incoming Course					
KINY	1003	Kinyarwanda			
Transferred to Term	2016 Spring as				
FRLN	1000T	Non-UVa Transfer/Test Credit	TR	3.00	

2016 Fall
School: Batten Leadership & Public Pol
Major: Public Policy and Leadership

FREN	2020	Intermediate French II	A	3.0
PPOL	3001	Public Policy Writing Lab	A	1.0
PPOL	3200	Introduction to Public Policy	B+	3.0
PPOL	3210	Intro to Civic Leadership	A	3.0
RELC	5559	New Course: RELC	A-	3.0
Course Topic:		Contemporary Cath Theo		
RELC	3559	New Course: RELG	A+	3.0
Course Topic:		Research Religion and Conflict		
Curr Credits	16.0	Grd Pts	61.000	GPA 3.813
Cuml Credits	62.0	Grd Pts	225.700	GPA 3.700
Honor:		Dean's List		

Incoming Course					
ANTH	3500	Research Methods & Ethics			
Transferred to Term	2016 Spring as				
ANTH	3000T	Non-UVa Transfer/Test Credit	TR	3.00	

Incoming Course					
ISPR	3000	Independent Study Project			
Transferred to Term	2016 Spring as				
ANTH	3000T	Non-UVa Transfer/Test Credit	TR	4.00	

Transfer Credit Total:				16.00	
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Transfer Credit from Fordham University
Applied Toward Ldsh & Public Policy Undergrad Program

Incoming Course					
THEO	3200	Intro to New Testament			
Transferred to Term	2016 Fall as				
RELC	1220	Early Christianity & N Testmnt	TM	3.00	

2017 January
School: Batten Leadership & Public Pol
Major: Public Policy and Leadership

MATH	2700	Euclidean and Non-Eu. Geometry	B+	3.0
Curr Credits	3.0	Grd Pts	9.900	GPA 3.300
Cuml Credits	65.0	Grd Pts	235.600	GPA 3.681

Transfer Credit Total:				3.00	
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Beginning of Undergraduate Record

2014 Fall
School: College & Graduate Arts & Sci
Major: Arts & Sciences Undeclared

ARH	1010	History of Architecture I	A-	4.0
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2017 Spring
School: Batten Leadership & Public Pol
Major: Public Policy and Leadership

INST	3150	CavEd Pedagogy Seminar	CR	1.0
PPOL	3230	Pub Policy Challenges, 21st C	A-	3.0
PPOL	3295	Global Humanitarian Crises	A	3.0
PPOL	4200	Inst & Pol Context of PPol	A-	3.0
PPOL	4250	Economics of Public Policy	B+	3.0

Robert Thomas McCarthy

06/09/2023

PPOL	6500	Topics in Public Policy	A	1.0
Course Topic:		Strategic Political Communicatn		
RELC	5077	Pius XII, Hitler the US & WW II	A	3.0
Curr Credits	17.0	Grd Pts	60.100	GPA 3.756
Cuml Credits	82.0	Grd Pts	295.700	GPA 3.696
Honor:		Dean's List		

2017 Fall

School:		Batten Leadership & Public Pol		
Major:		Public Policy and Leadership		
Major:		Religious Studies		
PPOL	3255	Comparative Policy History	A-	3.0
PPOL	3260	Value & Bias in Public Policy	A	3.0
PPOL	4240	Resrch Methods & Data Analysis	B+	3.0
PPOL	5540	Applied Policy Clinics	B+	2.0
Course Topic:		VA Transition Team Clinic		
PPOL	6765	Federal and State Budgeting	B+	3.0
RELB	2054	Tibetan Buddhism Introduction	A-	3.0
Curr Credits	17.0	Grd Pts	60.600	GPA 3.565
Cuml Credits	99.0	Grd Pts	356.300	GPA 3.673

2018 Spring

School:		Batten Leadership & Public Pol		
Major:		Public Policy and Leadership		
Major:		Religious Studies		
EVSC	2010	Materials Shape Civilizations	A-	3.0
PPOL	4210	Ethics in Public Policy	B	3.0
PPOL	4991	Capstone Seminar	A-	3.0
Course Topic:		Strat/Ldrshp in Disastr/Conflt		
RELB	2559	New Course: RELB	A-	3.0
Course Topic:		Art of Tibet and the Himalayas		
RELG	4500	Majors Seminar	A	3.0
Course Topic:		Evil and Suffering		
Curr Credits	15.0	Grd Pts	54.300	GPA 3.620
Cuml Credits	114.0	Grd Pts	410.600	GPA 3.666

End of Undergraduate Record

UNIVERSITY OF NOTRE DAME

NOTRE DAME, INDIANA 46556

McCarthy, Robert Thomas
Student ID: XXXXX5317

Date Issued: 12-JUN-2023
Page: 1

Birth Date: 11-06-XXXX

Degree Awarded: Master of Education
Date Conferred: May 17, 2020
College: Social Science
Candidacy Date: Admitted to master's degree candidacy 4/23/2020

Issued To: Robert McCarthy
Parchment DocumentID: TWNE3TTN
rtmccarthy11@gmail.com

Course Level: Graduate
Program: Master of Education
College: Social Science
Major: Education Program

CRSE	ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS				OVERALL TOTALS			
						ATTEMP HRS	EARNED HRS	GPA HRS	GPA	ATTEMP HRS	EARNED HRS	GPA HRS	GPA
UNIVERSITY OF NOTRE DAME CREDIT:													
Summer Session 2018													
Social Science													
EDU	60022	Intro to Teaching - Elementary	1.000	A	4.000								
EDU	60070	Teaching Rel in Cath Schools	1.000	A	4.000								
EDU	60102	Effctve Elem Clsrm Tchng	2.000	A	8.000								
EDU	60132	Mathematics in Elem Educ	2.000	A	8.000								
EDU	60182	Teaching of Reading	3.000	A	12.000								
EDU	60192	Sci and SS Teaching in Elem	1.000	A	4.000								
EDU	63500	Integrative Seminar	1.000	A	4.000								
EDU	65032	Practicum - Elementary	2.000	A	8.000								
		Total			52.000	13.000	13.000	13.000	4.000	13.000	13.000	13.000	4.000
Fall Semester 2018													
Social Science													
EDU	65930	Clinical Seminar	1.000	A	4.000								
EDU	65950	Supervised Teaching	2.000	A	8.000								
-		Total			12.000	3.000	3.000	3.000	4.000	16.000	16.000	16.000	4.000
Spring Semester 2019													
Social Science													
EDU	60410	Topics in Educational Psych	2.000	A-	7.334								
EDU	65930	Clinical Seminar	1.000	A	4.000								
EDU	65950	Supervised Teaching	2.000	B	6.000								

CONTINUED ON PAGE 2

UNIVERSITY OF NOTRE DAME

NOTRE DAME, INDIANA 46556

McCarthy, Robert Thomas
Student ID: XXXXX5317

Date Issued: 12-JUN-2023
Page: 2

Birth Date: 11-06-XXXX

CRSE ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS				OVERALL TOTALS			
					ATTEMP HRS	EARNED HRS	GPA HRS	GPA	ATTEMP HRS	EARNED HRS	GPA HRS	GPA
University of Notre Dame Information continued:												
-		Total		17.334	5.000	5.000	5.000	3.467	21.000	21.000	21.000	3.873
Summer Session 2019												
Social Science												
EDU 60142	Reading and Lang Arts in Elem	3.000	A	12.000								
EDU 60162	Content Methods for Elem Educ	2.000	A	8.000								
EDU 60312	Inclusive Teach Practices Elem	3.000	A	12.000								
EDU 60455	Devel/Moral Educ in Child/Adol	3.000	A	12.000								
EDU 60865	Blended Learning	1.000	A	4.000								
EDU 60875	Supporting ELL	1.000	A	4.000								
EDU 63500	Integrative Seminar	1.000	A	4.000								
		Total		56.000	14.000	14.000	14.000	4.000	35.000	35.000	35.000	3.924
Fall Semester 2019												
Social Science												
EDU 60172	Assessment in Elementary Educ	1.000	A-	3.667								
EDU 60885	Supporting ELL II	2.000	A	8.000								
EDU 65930	Clinical Seminar	1.000	A	4.000								
EDU 65950	Supervised Teaching	2.000	A	8.000								
-		Total		23.667	6.000	6.000	6.000	3.945	41.000	41.000	41.000	3.927
Spring Semester 2020												
During the Spring 2020 semester, a global health emergency required significant changes to coursework. Unusual enrollment patterns and grades reflect the tumult of the time.												
Social Science												
EDU 60172	Assessment in Elementary Educ	1.000	A-	3.667								
EDU 65935	Capstone Sem in Teach & Pract	1.000	A	4.000								
EDU 65950	Supervised Teaching	2.000	A	8.000								
-		Total		15.667	4.000	4.000	4.000	3.917	45.000	45.000	45.000	3.926

CONTINUED ON PAGE 3

UNIVERSITY OF NOTRE DAME

NOTRE DAME, INDIANA 46556

McCarthy, Robert Thomas
Student ID: XXXXX5317

Date Issued: 12-JUN-2023
Page: 3

Birth Date: 11-06-XXXX

***** TRANSCRIPT TOTALS *****				
NOTRE DAME	Ehrs:	45.000	QPts:	176.668
	GPA-Hrs:	45.000	GPA:	3.926
TRANSFER	Ehrs:	0.000	QPts:	0.000
	GPA-Hrs:	0.000	GPA:	0.000
OVERALL	Ehrs:	45.000	QPts:	176.668
	GPA-Hrs:	45.000	GPA:	3.926
***** END OF TRANSCRIPT *****				



CAMPUS CODES

All courses taught at an off campus location will have a campus code listed before the course title.

The most frequently used codes are:

AF	Angers, France
DC	Washington, DC
FA	Fremantle, Australia
IA	Innsbruck, Austria
IR	Dublin, Ireland
LA	London, England (Fall/Spring)
LE	London, England (Law-JD)
LG	London, England (Summer EG)
LS	London, England (Summer AL)
PA	Perth, Australia
PM	Puebla, Mexico
RE	Rome, Italy
RI	Rome, Italy (Architecture)
SC	Santiago, Chile
SP	Toledo, Spain

For a complete list of codes, please see the following website:
<http://registrar.nd.edu/pdf/campuscodes.pdf>

GRADING SYSTEM - SEMESTER CALENDAR

Previous grading systems as well as complete explanations are available at the following website:

<http://registrar.nd.edu/students/gradeinfo.php>

August 1988 - Present

Letter Grade	Point Value	Legend
A	4	
A-	3.667	
B+	3.333	
B	3	
B-	2.667	
C+	2.333	
C	2	Lowest passing grade for graduate students.
C-	1.667	
D	1	Lowest passing grade for undergraduate students.
F	0	Failure
F*	0	No final grade reported for an individual student (Registrar assigned).
X	0	Given with the approval of the student's dean in extenuating circumstances beyond the control of the student. It reverts to "F" if not changed within 30 days after the beginning of the next semester in which the student is enrolled.

I 0 Incomplete (reserved for advanced students in advanced studies courses only). It is a temporary and unacceptable grade indicating a failure to complete work in a course. The course work must be completed and the "I" changed according to the appropriate Academic Code.

U Unsatisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).

Grades which are not Included in the Computation of the Average

S Satisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).

V Auditor (Graduate students only).

W Discontinued with permission. To secure a "W" the student must have the authorization of the dean.

P Pass in a course taken on a pass-fail basis.

NR Not reported. Final grade(s) not reported by the instructor due to extenuating circumstances.

NC No credit in a course taken on a pass-no credit basis.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: <http://registrar.nd.edu/students/gradeinfo.php>

THE LAW SCHOOL GRADING SYSTEM

The current grading system for the law school is as follows: A (4.000), A- (3.667), B+ (3.333), B (3.000), B- (2.667), C+ (2.333), C (2.000), C- (1.667), D (1.000), F or U (0.000).

Effective academic year 2011-2012, the law school implemented a grade normalization policy, with mandatory mean ranges (for any course with 10 or more students) and mandatory distribution ranges (for any course with 25 or more students). For Legal Writing (I & II) only, the mean requirement will apply but the distribution requirement will not apply. The mean ranges are as follows: for all first-year courses (except for the first-year elective, which is treated as an upper-level course), the mean is 3.25 to 3.30; for large upper-level courses (25 or more students), the mean is 3.25 to 3.35; for small upper-level courses (10-24 students), the mean is 3.15 to 3.45.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: <http://registrar.nd.edu/students/gradeinfo.php>

TRANSCRIPT NOT OFFICIAL IF WHITE SIGNATURE
AND BLUE SEAL ARE DISTORTED

Chuck Hurley

CHUCK HURLEY, UNIVERSITY REGISTRAR

In accordance with USC 438 (6) (4) (8) (The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without the written consent of the student. Alteration of this transcript may be a criminal offense.

COURSE NUMBERING SYSTEM

Previous course numbering systems (prior to Summer 2005) are available at the following website:

http://registrar.nd.edu/faculty/course_numbering.php

Beginning in Summer 2005, all courses offered are five numeric digits long (e.g. ENGL 43715).

The first digit of the course number indicates the level of the course.

ENGL 0 X - XXX	= Pre-College course
ENGL 1 X - XXX	= Freshman Level course
ENGL 2 X - XXX	= Sophomore Level course
ENGL 3 X - XXX	= Junior Level course
ENGL 4 X - XXX	= Senior Level course
ENGL 5 X - XXX	= 5th Year Senior / Advanced Undergraduate Course
ENGL 6 X - XXX	= 1st Year Graduate Level Course
ENGL 7 X - XXX	= 2nd Year Graduate Level Course (MBA / LAW)
ENGL 8 X - XXX	= 3rd Year Graduate Level Course (MBA / LAW)
ENGL 9 X - XXX	= Upper Level Graduate Level Course

TO TEST FOR AUTHENTICITY: This transcript was delivered through Parchment, Inc. The original transcript is in electronic PDF form. The authenticity of the PDF document may be validated. Please see the attached cover letter for more information. A printed copy cannot be validated.

The document cannot be released to a third party without the written consent of the student. This is in accordance with the Family Educational Rights and Privacy Act of 1974.
 ALTERATION OF THIS DOCUMENT MAY BE A CRIMINAL OFFENSE!

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in support of the candidacy of Robert McCarthy for a clerkship in your chambers.

Robert, currently a student at NYU Law School, is a 2018 graduate of the University of Virginia graduate (where he was the graduation speaker) and a 2020 graduate of the University of Notre Dame. His resume clearly reflects that Robert is a person of substance, but what is less clear is Robert's enormous intellect and his extraordinary work ethic. He consistently supplements his classroom achievements with co-curricular work, and has fully engaged himself not only in the life of the law but also in the life of the legal academy.

I first met Robert when he enrolled in my 1L Reading Group titled "Baseball as a Road to God: Seeing Beyond the Game." This Reading Group, based on a seminar I have taught for more than a decade, links literature about our national pastime with the study of philosophy and theology. It explores ideas contained in classic texts such as Coover's Universal Baseball Association, Kinsella's Iowa Baseball Confederacy, and Malamud's The Natural with those found in philosophical and theological works such as Eliade's Sacred and Profane, Heschel's God in Search of Man, and James' Varieties of Religious Experience. It discusses such themes as the metaphysics of sports, the notions of sacred time and space, and the idea of baseball as a civil religion.

Robert excelled in the Reading Group. Indeed, his performance was exemplary, demonstrating exceptional ability in analyzing the assigned works and in presenting thoughtful oral arguments and analyses. Further, he made connections between the seminar materials and a far broader, interdisciplinary horizon. For example, even before the first meeting of the group, Robert wrote to me, indicating that he had pursued religious studies and public policy in college and then spent three years teaching 3rd grade at a Catholic school, so he often found himself grappling with questions of both what religious experience is and the various ways religious experience shapes individual and communities. This message was the first in a number of robust and dynamic exchanges and meetings which continue even now: Robert and I were in touch just a couple of weeks ago.

In fact, I was sufficiently impressed with Robert's work in the Reading Group that I invited him to work with me as my Teaching Assistant for the "Baseball as a Road to God" undergraduate seminar this forthcoming Fall Term. I have every confidence he will bring the same enthusiasm to the classroom for the undergrad students, and I look forward to working with him.

Robert is deeply engaged not only in the academic life of the law, but also the wider law school community. For example, he participated in the Parole Preparation Project, which assists those incarcerated to prepare for parole hearings. As Robert described it, he spent time on this project because he sought an opportunity to engage with client advocacy. He also is the incoming Executive Editor of the Journal of Legislation and Public Policy, because he indicated he wants to work closely with the development of scholarship.

In my view, Robert is an ideal candidate. He is intellectually keen and inquisitive, he is experienced in both the substantive law and scholarship, and he has demonstrated experience working effectively not only as an individual but also as an integral part of a team. It is for all these reasons it is my pleasure to write in support of his candidacy.

Sincerely,

John Sexton

John Sexton - john.sexton@nyu.edu - 212-992-8040

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Robert McCarthy for a clerkship in your chambers. I first came to know Robert as a student in my 1L Torts class during the Spring 2022 semester, in which he earned an A. Based on his strong performance in Torts, I asked Robert to be the head/coordinating Teaching Assistant (TA) for the Fall 2022 semester, as well as a Research Assistant (RA), and am glad to have done so. Robert was also a student in my Business Torts class this past semester, in which he earned a B+.

As the head Torts TA, Robert was instrumental in ensuring all TA meetings ran smoothly, and gladly assisted me with all logistical aspects of running the class without complaint. On a substantive level, he proved extremely capable in assisting me in reviewing and suggesting helpful updates to the negligence section of the course syllabus. As was shown in their course evaluations, the students assigned to his discussion section were extremely appreciative of Robert's review sessions, and his ability to explain even the most challenging aspects of the material addressed in class.

Robert's work as an RA also proved helpful to me. He assisted me with research in connection with a book review I was writing, and in particular identified helpful case law that addressed the role and impact of insurance in tort law. Robert was consistently on time with his work and receptive to my guidance towards additional research avenues. He also helped me with final edits to the book review on a tight deadline that, moreover, required intensive work over a holiday weekend.

Robert was a strong participant in my Business Torts class, and his final paper was an interesting exploration of the role of common law defamation in reinforcing or negating societal prejudices.

On a personal level, Robert is a mature, enthusiastic, and personable young man who is a pleasure to work with. He takes his responsibilities seriously and is highly receptive to, and adept at integrating, constructive feedback. I believe Robert would be a valuable asset to your chambers, and I hope you will seriously consider him as a candidate.

Sincerely,
Catherine M. Sharkey
Segal Family Professor of
Regulatory Law and Policy

Catherine Sharkey - catherine.sharkey@nyu.edu - 212-998-6729

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in strong support of Robert McCarthy's application for a clerkship.

As an NYU Law student, Robert spent an intensive semester in the Education Sector Policy and Consulting Clinic that I lead. This program selects law, business, education, policy, and data sciences students from multiple professional schools nationwide to spend a semester together studying and leading legal and policy research and consulting projects on the organization, governance, and regulation of public-sector institutions with a particular focus on the nation's public education systems. From this vantage point, I am able to observe my students' analytic acuity, expository writing, and oral contributions in a deeply conceptual, seven-credit seminar-style exploration of the structure, design, and transformation of public-sector institutions, as well as their capacity for practical application of what they're learning in team-based multi-disciplinary projects on behalf of public agencies. In Robert's case, the project work was on behalf of a state department of education endeavoring to embed in legislation, regulations, and practices a new approach to the selection of and preparation of educators and students to make effective use of high-quality instructional materials in literacy, mathematics, and science.

Robert came to the program with a strong interest in the lawyer's role in developing and advancing public policy, particularly at the state and local level, and with a special interest in New York City and State. In the seminar portion of the program, Robert was a regular and reliable participant in class discussions. His comments were smart and efficient. He always was well-prepared, demonstrated a strong grasp of the readings including the more conceptual ones that some of the other students struggled with, strove to put the ideas together in his own way and form his own judgments, and revealed a knack for bringing his own experiences—particularly as an elementary school teacher and a candidate for local office—productively to bear. His writing was strong, practical, and accessible to multiple audiences.

In the intensive and time-pressured project work, with high quality demands (our institutional clients pay for our services and demand strong work), Robert again generated effective written work well-targeted to the client, consistently met deadlines, responded quickly and well to feedback, effectively edited other students' work, and often took on late-appearing tasks that his efficient work on his own assignments freed him up to cover. His gentle and respectful manner, consideration for his teammates, sense of humor, and (again) his facility for clarifying matters by drawing on his own experiences, made him an especially valued colleague. His teammates' evaluations of Robert are filled with encomia both about his practical role on the team (keeping the focus on the question at hand, the client's needs, and the best way to make matters salient to the client) and his manner ("kind, open and thoughtful," "a key part of our team morale," "lit up the room and kept us positive and focused").

It was only partway through the semester that I realized that, at the same time as Robert was performing so well in and contributing so productively to all aspects of the program, he was also training for—and during the semester ran—the New York marathon. In conversations outside of class, I also found that Robert was avidly tracking and thinking about a variety of policy issues affecting local and state government, with a focus on environmental as well as public education issues. Robert's capacity for managing his time, and for keeping a broad perspective on his professional and personal interests, add to my admiration for him as a student and colleague.

For these reasons, I believe Robert would make a terrific law clerk, and I strongly recommend him for that position.

Please let me know if I can provide any other information.

Sincerely,
James S. Liebman

James S. Liebman - jliebman@law.columbia.edu - 212-854-3423

Robert McCarthy

rm6082@nyu.edu; 516-510-6673

Writing Sample

This writing sample is a final paper, which I wrote for Prof. Catherine Sharkey's Business Torts: Defamation, Privacy, Products and Economic Harms. The paper examines how society and common law interact, particularly in regards to sexuality and defamation. This sample is my original work product with no edits or feedback for a third party.

Courts both shape and are shaped by public opinion. After all, judges are members of society, capable of both setting aside prejudices and succumbing to them. As a result, culture influences common law, influencing what is and what is not a tort. Defamation, a notoriously imprecise tort even according to Prosser,¹ shows the interplay between society influencing tort and society influenced tort. With the noble tradition of common law comes noble responsibility. For this reason, judges should no longer recognize a statement that states someone is not straight as defamatory, and this should apply to both *per se* and *per quod* defamation. Sexuality-based defamation should no longer be actionable because courts should neither assume nor find reputational or economic harm.

Courts should not be open forums to litigate sexuality, including what sexuality is and what sexuality isn't. While the contours of sexuality can be debated, one way to conceptualize sexuality is in its division of status and conduct. Since *Bowers v. Hardwick*, and even before, the courts inability to grapple with these questions has been clear. In the past, courts were willing to deem the mere invocation that someone is gay, lesbian, or bisexual as *per se* defamatory, meaning that courts participated in condemning status. Both conduct and status should be beyond the reach of defamation. One way of expressing sexuality is as a private aspect of one's identity, even if many individuals choose to live their sexuality publicly. However, just because the majority of individuals choose to live their sexually publicly does not mean that the ability for someone to keep this private should not be respected by the courts.

While courts once found defamatory claims actionable when acts of homosexuality were criminalized, courts must interpret the law with an eye towards societal realities. At the same time, courts should not discard all precedent. Yet, sexuality-based defamation serves a double

¹ Robert Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 691 (1986).

bind by ensuring straight people can recover and reinforcing negative stereotypes. No one likes having inaccurate statements spread about oneself, and courts are not removing all causes of action; privacy related torts can fill in the gap, leaving the correct cause of action intact for individuals who are either straight or a sexual minority.² In order to most convincingly make these arguments, the roadmap is as follows.

First, defamation and what interests it protects will be explored. Second, cases that show the interaction between sexuality and defamation will be prodded and compared. Third, privacy related torts will be offered as torts that allow recover without reinforcing prejudicial thinking. Finally, specific examples of how privacy torts may cover this space will be presented.

First, jurisdictions often divide defamation into two categories: *per quod* or *per se*.³ A *per se* defamatory publication involves “statements so harmful to reputation that damages are presumed.”⁴ On the other hand, *per quod* defamatory publication involves “statements requiring extrinsic facts to show their defamatory meaning.”⁵ While each state defines *per se* slightly differently, the categories are quite similar.

As articulated in *Muzikowski*, common law in Illinois offers five categories of *per se* defamation: criminal offense, infection with a venereal disease, inability or corruption in public office, fornication or adultery, or prejudice in trade, profession or business.⁶ In New York, the “four established ‘per se’ categories recognized by the Court of Appeals are ‘statements (i)

² In culture, “straightness” has been presented as normative, and “nonstraightness” as a derivation of the norm. Defamation is a value laden tort, relying on the premise that one feels inferior or shameful, and this needs to end. Sexual minority was used above to be the most inclusive term but throughout this paper gay, lesbian, and bisexual are most often used. Two notes deserve mention. First, this is not to imply the challenges of people whose sexualities are not listed have not been defamed, and defamation for all sexual identities should end. Second, the burgeoning social movement for acceptance will likely not be for sexuality-based rights but gender-based rights. While there are certain areas of overlap, this overlap is not complete. In offering a roadmap for ending defamation for sexuality-based defamation, hopefully principles can be applied to an analogous, but not identical, overdue social movement.

³ *Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918, 924 (7th Cir. 2003).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

charging [a] plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that [a] plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman.”⁷ Historically, same-sex activity would be criminalized. Contemporarily, figuring out where stating that someone is gay, lesbian, or bisexual fits in is challenging.

Defamation has two major elements: publication and defamatory statements. While each court may slightly tweak the exact definition of defamation in their jurisdiction, defamation must always include unprivileged publication to a third party.

RST § 577 explains that publication is “communication intentionally or by a negligent act to one other than the person defamed.” Further, liability extends when someone “intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control.” At times, the definition of publication might seem incongruous, or even changing itself. For example, in *Mimms v. Metropolitan Life Ins. Co.*, the 5th Circuit did not find publication. In this case, Mimms asked Alabamian Sen. Sparkman to write a letter to Metropolitan Life Insurance Co. asking why Mimms was fired. Disagreeing with New York precedent that would categorize a stenographer as a third party, the 5th Circuit holds that both the president and the stenographer were acting as one corporate agent of Metropolitan Life. Therefore, they could not be treated as a third party. Further, the court did not find Sen. Sparkman to be a third party because he was acting as Mimms’s agent. In dissent, Judge Rives explains that he found a third party in both to the stenographer and Senator Sparkman.

While most cases involving sexuality will not quibble over what constitutes publication, *Mimms* instructs in another way by underscoring that courts will whittle common law. In this case, precedent was modified, offering a shield for a corporation on an “agent” theory, where concerted effort would neutralize the existence of a third party. Similarly, courts can look at

⁷ *Yonaty v. Mincolla*, 97 A.D.3d 141, 144 (2012).

defamation *per se* and state their resistance to assuming damages. After all, if the meaning of publication is open to debate and responsive to the growth of corporations, what constitutes damage should be up to debate and responsive to the (long overdue) acceptance of lesbian, gay, and bisexual individuals.

The second element of defamation is a defamatory statement. According to the RST § 588 defamation includes the following elements: a false and defamatory statement, fault, and harm. Implicit in this understanding is the duty not to defame, but what is not clear is how society would define defamation. In order to determine what is defamatory, what constitutes acceptance and what constitutes community must be answered.

In regards to acceptance, both acceptance of marriage and moral acceptability can show national opinion. A May 2022 Gallup survey showed, 71% of surveyed individuals thought same-sex couples should have their civil marriages recognized while 28% did not.⁸ These numbers should be compared to an almost complete inversion from the 1996 May Gallup poll where 27% of surveyed individuals viewed same-sex civil marriage as valid while 68% did not.⁹ These statistics parallel general moral acceptance of gay and lesbian relations, with 71% of surveyed individuals saying gay and lesbian relations are “morally acceptable” and 25% of surveyed people saying these relationships were “morally unacceptable.”¹⁰ Court have shifted in other ways relating to sexuality, including in jury instructions for criminal cases. Whether as a mitigating consideration or a complete defense, courts once considered a same-sex advance to be a reasonable provocation for murder.¹¹

⁸ Gallup. In Depth: Topics A to Z - LGBT Rights. <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Joshua Dressler, *When Heterosexual Men Kill Homosexual Men: Reflections on Provocation Law, Sexual Advances, and the Reasonable Man Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 726-27 (1994-1995).

Courts should not wait until 100% of people surveyed support same-sex marriage or find these relationships morally acceptable. Waiting for a threshold of 100% seems both impractical and strained. Further, courts will operate within the bounds of society and should not be viewed as activists or unelected legislators with a 70% support rate. With these levels of social acceptance, harm should not be assumed for *per se* defamation. In fact, courts should not be bound by previous minoritarian judicial thinking and should not accept harm for *per quod* sexuality-based defamation. Courts need to fully condemn thinking that allows being called lesbian, gay, or bisexual to be defamatory.

In the past, courts have declared *per se* defamation for causes of action that society would certainly not view as defamatory today. For example, the Supreme Court of South Carolina upheld that misidentifying a white person as Black could lead to liability for *per se* defamation.¹² In ruling, the court explained that being misidentified as Black impacts one's standing in society and brings one down in the estimation of friends.¹³ In so doing, the Supreme Court of South Carolina further reinforced racism in its courts and its laws. As evidenced by this, courts exist in their communities. If courts continue to accept claims of defamation when discussing people's sexuality, courts will reinforce homophobia. Allowing a defamation action strikes at principles of equality.

As far as determining the "community," two questions should be probed, both of which can be done briefly. First, what community should be used? Second, should defamation be able to apply to communities?

First, there should be a national standard to apply. Statistically, the nation accepts same-sex relationships. While some states, such as New York, may exceed the national average, and

¹² *Bowen v. Independent Publishing Company*, 230 S.C. 509, 513 (1957).

¹³ *Id.*

some states, such as Mississippi, may be below, a national standard should be pursued. In many ways, this implicates the “reasonable” or “ordinary” person standard. Indeed, when data shows what an ordinary person thinks, the ordinary person may best be a national ordinary person. Mindful of the past interventions of the United States Supreme Court in defamation law, this does not serve as an invitation for intervention.

Common law has a role to play in recognizing people’s rights. The next wave of defamation may not rest with sexuality-based actions but gender-based actions. Once again, the courts should step in and note that being called transgender is not a form of defamation.¹⁴ The court needs to recognize the psychological, moral, and political messages sent by what it defines as defamation.

Second, defamation will almost always refer to an individual in order to meet the “of and concerning” element. However, in a few instances, group defamation has been found actionable. In *Elias v. Rolling Stones LLC*, for the first time, the Second Circuit formally recognized that small group defamation existed. Judge Lohier held that subsequently proven false accusation in a *Rolling Stones* article about of a fraternity of 57 members at the University of Virginia committing sexual assault could be considered “of and concerning” the plaintiffs. While this logic applied well to this case, it must be contained. Well before *Elias*, precedent exists in the Second Circuit in *Neiman-Marcus v. Lait*.¹⁵ Here, the court held that a cause of action existed to allow a class-action defamation suit involving claims that a group of twenty-five employees was composed of mostly gay men. *Neiman-Marcus* serves as a forerunner to *Elias* in recognizing group defamation. Both *Elias* and *Neiman-Marcus* show the importance of having small groups

¹⁴ Indeed, this proposition animates *Simmons v. American Media, Inc.*, No. BC660633, 2017 WL 5325381 (Cal. Super. Sept. 1 2017). The opinion notes “even if there is a sizable portion of the population who would view being transgender as negative, the court should not... ‘directly or indirectly, give effect to these prejudices.’”

¹⁵ 13 F.R.D. 311 (S.D.N.Y. 1952).

where defamatory statements have a high degree of fungibility and could apply to anyone. If a publication of sexuality should no longer be considered defamatory for an individual, rather logically, a publication of sexuality should not be considered defamatory for a group.

Both acknowledging the inherent confusion and seeking to bring order to this confusion, Robert Post offers three frames to conceptualize what defamation protects: honor, dignity, and property.¹⁶ While all three lens offer important viewpoints into defamation, dignity presents the strongest case for ending defamation in regards to sexuality. Quoting Justice Stewart's concurrence in *Rosenblatt v. Baer*, Post notes the challenges of conceptualizing dignity, despite Justice Stewart's poetic invocation of "our basic concept of the essential dignity and worth of every human being."¹⁷ This dignity manifests itself as respect and self-respect.¹⁸ Traditionally, defamation protects dignity by preventing belittling. Being called something you are not is painful. Being defamed is painful, but being called lesbian, gay, or bisexual should be neither defamatory nor painful. The statements should be neutral, much like a statement incorrectly stating someone's eye color. Therefore, in this instance, the courts upholding sexuality-based claims as defamatory serves as the wrong.

Of course, defamation conversations in the United States take place in the long and pervasive shadow of *New York Times v. Sullivan* and its progeny. In its constitutionalization of defamation, *New York Times* froze and sullied the reputable common law tradition. Legislatively, section 230(c) Communications Decency Act of 1996 extended protections to the then fledgling Internet, also limiting defamation liability. However, the protections offered by the Communications Decency Act of 1996 may be modified this summer by the Supreme Court, and there is an appetite to reconsider the precedent from *New York Times v. Sullivan*. Algorithms

¹⁶ Robert Post, *supra* note 1, at 693.

¹⁷ *Id.* at 707, quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

¹⁸ *Id.* at 711.

implicate interesting questions in regards to privacy (i.e., does a suggested ad or mailing invade on privacy?). Safe to say, the Internet without the ability to target ads via data because of privacy concerns would look quite different. As seen in the oral argument for *Gonzalez v. Google*, these questions play a large role in society, but judges are not the best equipped to answer them.

Second, previous cases exploring the relationship between sexuality and defamation should be brought into conversation to help elucidate the pitfalls of sexuality-based defamation claims. The first case comes from Massachusetts District Court in 2004, the subsequent pair of cases come from New York only four years apart, and these cases show how judges are interacting with societal opinion.

In *Albright v. Morton*,¹⁹ on a motion to dismiss, the judge wrote, “[i]n 2004, a statement implying that an individual is a homosexual is hardly capable of a defamatory meaning.”²⁰ The case took place after *Lawrence v. Texas* and the Supreme Judicial Court of Massachusetts declaring it unconstitutional in Massachusetts to not allow same-sex marriage. The opinion noted that upholding sexuality-based defamation is an act of prejudice and bigotry²¹ and that to acknowledge defamation here would reinforce the unjust second-class citizenship of same-sex couples.²² While, Albright attempts to recover under false light, a more appropriate and less value laden tort, the judge noted that Massachusetts does not recognize the tort of false light and refused to expand it for this case.²³

A diametrical opposed pair of New York cases, one in S.D.N.Y and one in state court, show how judges interact with common law. In the 2008 S.D.N.Y. case *Gallo v. Alitalia-Linee*

¹⁹ 321 F.Supp.2d 130 (2004).

²⁰ *Id.* at 132.

²¹ *Id.* at 133.

²² *Id.* at 138.

²³ *Id.* at 140.

Aeree Italiane-Societa per Azioni,²⁴ Gallo sought to recover under *per se* defamation after being called gay by his boss. The court explained that “certain people view homosexuality as particularly reprehensible”²⁵ even if “[t]he Court recognizes that many in our society no longer hold such beliefs ... homophobia is sufficiently widespread and deeply held that an imputation of homosexuality can—at least when directed to a man married to a woman—be deemed every bit as offensive as imputing unchastity to a woman.”²⁶ In a footnote, the judge offered, “[a]ll the sexual categories of slander *per se* appear somewhat outmoded in view of contemporary mores,”²⁷ but based on New York state court precedent, the judge noted both being confined and the challenge of interpreting rules upholding homophobia. While this plaintiff could not recover under intrusion upon seclusion (seemingly, his boss was a bigoted bully), the plaintiff could recover on false light. Noting his discomfort, the judge applied rather than shaped the common law. This judicial act upheld homophobia and underscores the need for courts to adapt to times.

Just four years later in the Second Division of the New York Supreme Court, *Yonaty v. Mincolla*²⁸ came to the exact opposite conclusion as *Gallo*. Here, the harm to Yonaty was quite clear as the defendant schemed to ensure that Yonaty’s girlfriend would hear a rumor that Yonaty was gay or bisexual, which ultimately set into motion the dissolution of Yonaty and his girlfriend’s relationship.²⁹ In response to Yonaty’s claim that being called gay or bisexual is *per se* defamation, the court flatly refused, and not just for one reason but for multiple. The court noted that being called gay was *per se* defamation in the past because this imputed shame, insinuated a “serious crime,” and occurred in a pre-*Lawrence* world.³⁰ Further, in disagreeing

²⁴ 585 F.Supp.2d 520 (2008).

²⁵ *Id.* at 549.

²⁶ *Id.*

²⁷ *Id.* at 555 n.16.

²⁸ 97 A.D.3d 141.

²⁹ *Id.* at 142.

³⁰ *Id.* at 144.

with another division of the New York Supreme Court, the court noted that “at this point in time” served as a previous justification.³¹ The point in time had shifted, and the courts felt no obligation to uphold the homophobia inherent in that decision. Opportunities for recovery will still exist as sexuality-based defamation fades to the history books.

Third, defamation should no longer encompass statements involving sexuality. Instead, plaintiffs should seek recovery under privacy related torts including intrusion upon seclusion, public disclosure of embarrassing private facts, and false light. While embarrassing does not carry the same baggage as defamation, referring to someone’s sexual identity as embarrassing is hardly a step forward. The harm should be recognized as force disclosure of private information, not being called lesbian, gay, or bisexual. False light, which comes with less laden and shame inducing words, can still stand as an option for straight individuals who were called lesbian, gay, and bisexual. After all, society should limit falsehoods.

Privacy is particular fitting as a cause of action because it may have served as the desire for Warren to team up with Brandies to write *The Right to Privacy*. Although debate swirls, the spark for Warren may have been protecting the privacy of his gay brother.³² Of course, the nobility of this act depends on whether Warren acted out of care or out of embarrassment. Conceptually, two essential questions are raised by empowering intrusion upon seclusion: who is owed this privacy and how should damages be calculated.

Privacy is a general duty owed but does not extend to all aspects of life. According to RST § 652B, the intrusion must be both intentional and highly offensive. While duty is the first step in analyzing negligence-based torts, for an intentional tort like intrusion upon seclusion, duty serves as an exoskeleton. If the realm of intrusion on seclusion is expanded too widely,

³¹ *Matherson v Marchello*, 100 A.D.2d 233, 241 (1984).

³² Sue Halpern. *Private Eyes*. NEW YORK REVIEW OF BOOKS. Mar. 9 2023, <https://www.nybooks.com/articles/2023/03/09/private-eyes-the-fight-for-privacy-citron/>.

conservations will be quite quiet, as they wouldn't be able to happen. As analogy, damages spring from ideas present in trespass to land where damages were assumed. This idea is more fully explored in *Boring v. Google Inc.*,³³ where taking a picture was analogized to physical trespass.

Using privacy-based torts addresses an incongruity currently embedded in the law: truth as complete defense. For example, if a newspaper were to publish a story with a photo captioned, "X is seen with his boyfriend taking advantage of a Restaurant Week," an act for defamation would open. If X were straight, he would be able to sue saying he was defamed. If X were gay and closeted, he would also be able sue, but the newspaper could invoke a defense of truth. Of course, this seems unlikely now, but this possibility still does exist. This argues for another reason why sexuality-based torts should be migrated strictly to privacy; operating under a privacy regime, as opposed to defamation regime, equalizes recovery for both straight and lesbian, gay, and bisexual individuals.

Further, privacy serves as a much more appropriate deterrent than defamation and allows gay, lesbian, and bisexual individuals to protect themselves. While tort has many purposes, damages tend to assist either deterrence or wholeness. Certainly, financial compensation helps make one whole, but in very few instances (i.e., intentional interference with prospective advantage) can tort come close to succeeding in that goal. Tort should focus on keeping people whole rather than making people whole. That is proper deterrence. A forced outing is essentially nonquantifiable, and thus, economically challenging to compensate. Sexuality-based defamation uniquely hurts gay, lesbian, and bisexual individuals, depriving them of their ability to recover and reinforcing exclusionary mindsets. Additionally, moving to a privacy-based model creates clear lines. If someone has publicly stated their sexuality whether through word or deed, the

³³ 362 Fed. Appx. 273 (3rd Cir. 2010).

press can report on it; if someone has not, this part of their life remains private. This will help keep reporting more issue focused and less personality driven.

Of course, this is far from a panacea, and *Sipple v. Chronicle Publishing Co.*³⁴ shows the limits of recovery under a privacy-based tort regime. After Sipple prevented an assailant from shooting President Gerald Ford, potentially saving his life, publicity followed.³⁵ In this publicity, one columnist noted that Sipple was gay, a fact he had not shared with his family.³⁶ Regrettably, when Sipple's family found out, they abandoned him, causing him emotional pain. The court held that this publication was newsworthy, non-intrusive, and helped counteract negative stereotypes about gay individuals.³⁷ Such is the costs of litigation – sometimes your client loses but a societal movement wins. Yet, anytime an action is deemed defamatory when relating to sexuality, that client wins, but society loses.

From an incentive-based level, the *Sipple* case should be evaluated further for two competing ideas. First, *Sipple* invokes important questions about “community” not mentioned in the discussion of community above. In Sipple's case, one of the communities that seemed to matter most to him was his family, and as a result of the reporting, Sipple painfully lost his connection to his family. Second, *Sipple* shows how migrating sexuality-based torts to intrusion on seclusion is equalizing. Sipple would not have been able to sue for defamation because he was gay, and suing for defamation only serves as an option for straight individuals. Related to the familial point above, if Sipple's family didn't automatically cut him out but instead kept their distance, Sipple most likely would have outed himself by not pursuing a defamation claim. Defamation serves as a forced outing. While the process of sharing one's sexuality is different

³⁴ 20 Cal. Rptr. 665 (Ct. App. 1984).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

for each person, autonomy and freedom stand as two important bedrocks. Sexuality should be shared not forced out.

Two contemporary examples related to privacy and defamation include *New York Times'* expose of former Mayor Ed Koch and Peter Thiel's laser-focused takedown of Gawker.³⁸

First, former Congressman, former mayor, and (maybe most importantly) NYU Law alum, Ed Koch never discussed his sexuality while serving as mayor or after. Dying in 2013, Mayor Koch lived well into a more accepting time but still adamantly chose to keep his sexuality private from the press. Mayor Koch also ran for election when it was still acceptable for people who did not plan on voting for him to make signs saying, "Vote for Cuomo, Not the homo."³⁹ While many people speculate and discuss his sexuality, the *New York Times* treated this topic with deep focus, publishing an expose.⁴⁰ The piece was highly unnecessary and added nothing to the public discourse. Mayor Koch clearly sought to keep this element of his life private, and he was entitled to this.

Running for and serving in public office does not completely foreclose a private life. Of course, this does not mean that a mayor can simply protect all information under the umbrella of privacy, but Mayor Koch did not seek to have sexuality as part of his public life. For example, former Mayor Michael Bloomberg was known for enjoying frequent weekend trips to

³⁸ Nicholas Lemamm. *How Peter Thiel's Gawker Battle Could Open a War Against the Press*. NEW YORKER. May 31, 2016, <https://www.newyorker.com/news/news-desk/how-peter-thiels-gawker-battle-could-open-a-war-against-the-press>.

³⁹ Jen Chung. *Ed Koch Held Decades-Long Grudge Against Cuomos Over "Vote For Cuomo, Not The Homo" Posters*. GOTHAMIST. Feb. 1 2013, <https://gothamist.com/news/ed-koch-held-decades-long-grudge-against-cuomos-over-vote-for-cuomo-not-the-homo-posters>.

⁴⁰ Matt Flegenheimer & Rosa Goldensohn. *The Secrets Ed Koch Carried*. N.Y. TIMES. May 7, 2022, <https://www.nytimes.com/2022/05/07/nyregion/ed-koch-gay-secrets.html>.

Bermuda.⁴¹ This directly impacts the job a mayor can do and the frequency of the trips warranted disclosure.

Second, Peter Thiel made it one of his missions to bankrupt Gawker after Gawker disclosed that Peter Thiel was gay.⁴² Peter Thiel found his opportunity after Gawker published a video of Hulk Hogan having sex by financing the costs of litigation for Hulk Hogan and his lawyers.⁴³ Importantly, Hogan won his case not on a defamation claim but on an invasion of privacy claim.⁴⁴ This does not offer a roadmap forward in regards to litigation strategy, but this example underscores the need for recovery to exist when people are outed and the priority individual's place on privacy.

Courts and common law shape society, and neither the common law nor the courts should reinforce homophobia, which they currently do through allowing sexuality-based defamation. Instead, the common law should protect everyone's privacy, regardless of their sexuality. A regime based on privacy is much more respectful of people's identity, serves as a proper incentive to deter, and responds to a shift in societal acceptance of lesbian, gay, and bisexual individuals.

⁴¹ Michael Barbaro. *New York's Mayor, but Bermuda Shares Custody*. N.Y. TIMES. Apr. 25 2010, <https://www.nytimes.com/2010/04/26/nyregion/26bermuda.html>.

⁴² Wall Street Journal. *Billionaire Who Helped Bankrupt Gawker Explains Why*, YOUTUBE (Nov. 1, 2016), https://www.youtube.com/watch?v=_z4TGEhtdDA.

⁴³ *Id.*

⁴⁴ Nick Madigan & Ravi Somaiya. *Hulk Hogan Awarded \$115 Million in Privacy Suit Against Gawker*. N.Y. TIMES. Mar. 18, 2016, <https://www.nytimes.com/2016/03/19/business/media/gawker-hulk-hogan-verdict.html>.

Applicant Details

First Name **Jermel**
 Middle Initial **M.**
 Last Name **McClure**
 Citizenship Status **U. S. Citizen**
 Email Address **JMM2493@COLUMBIA.EDU**

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State/Territory
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Zip
10032
Country
United States

Contact Phone Number **9142162208**

Applicant Education

BA/BS From **State University of New York-Binghamton**
 Date of BA/BS **May 2018**
 JD/LLB From **Columbia University School of Law**
<http://www.law.columbia.edu>
 Date of JD/LLB **May 15, 2024**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Human Rights Law Review**
 Moot Court Experience **Yes**
 Moot Court Name(s) **Frederick Douglass Moot Court Team**

Bar Admission**Prior Judicial Experience**

Judicial Internships/ Externships	No
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Baylor, Amber
aab51@columbia.edu
(212) 854-8221

Moglen, Eben
moglen@law.columbia.edu
212-854-8382

Thomas, Kendall
kthomas@law.columbia.edu
212-854-2288

Sturm, Susan
ssturm@law.columbia.edu
212-854-0062

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jermel McClure, Jr.
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June 01, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

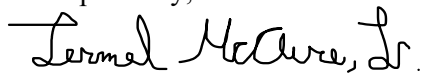
Dear Judge Walker:

I am a rising third-year student and member of the Human Rights Law Review at Columbia Law School. I write to apply for a clerkship in your chambers beginning in 2024 or any term thereafter.

The prospect of starting my legal career clerking in your chambers is particularly appealing due to your dedication to public service. I plan to pursue a career in private practice and public service, and your journey to the bench inspires me. The opportunity to gain practical experience with our federal court system by serving as a clerk will provide me with invaluable insight into the mechanisms that define the legal system. My relentless work ethic, research, and writing skills are strengths that I bring to this position. At Columbia, I have honed my research and writing skills as a national competitor in the Thurgood Marshall Moot Court competition, policy fellow for the Broadway Advocacy Coalition, and student attorney in the Criminal Defense Clinic. Last semester, I gained clinical experience working with indigent clients facing misdemeanor charges and successfully argued for the dismissal of my clients' cases. Currently, I co-lead a team of students working to reimagine the Human Rights Law Review's *Jailhouse Lawyers Manual (JLM)*. Our team is working with formerly incarcerated consultants to produce editions of the manual that include examples and visualizations informed by *JLM's* primary users. This initiative seeks to improve the resources available to incarcerated individuals by centering their community in the development of the publication. I would appreciate the opportunity to apply these skills in a clerkship position and to discuss these experiences in more detail.

Enclosed please find a resume, transcript, and writing sample. Following separately are letters of recommendation from Professors Amber Baylor (212-854-8221, abaylor@law.columbia.edu), Susan Strum (212-854-0062, ssurm@law.columbia.edu), Kendal Thomas (212-854-2288, kthomas@law.columbia.edu), and Eben Moglen (212-854-8382, moglen@law.columbia.edu). Thank you for your consideration. Please do not hesitate to contact me should you need any additional information.

Respectfully,


Jermel McClure, Jr.

JERMEL MCCLURE, JR.

450 W. 162nd St., Apt. 35E, New York, NY 10032 • (914) 216-2208 • jmm2493@columbia.edu

EDUCATION

Columbia Law School, New York, NY

J.D. expected May 2024

Honors: James Kent Scholar

Activities: Columbia Law School Black Men's Initiative, Co-President
Racial Literacy for Racial Justice, Co-Founder
Columbia Law School Student Senate, Secretary
Columbia Human Rights Law Review – Jailhouse Lawyers Manual, Staff Editor
Frederick Douglas Moot Court, National Competitor
Millstein Center for Global Markets & Corporate Ownership, Student Fellow
Paralegal Pathways Initiative, Participant Recruitment & Mentorship
Criminal Defense Clinic – Teaching Assistant

Binghamton University, Binghamton, NY

B.A., *cum laude*, received May 2018

Major: Political Science

Activities: Binghamton University Student Association, Student Body President
Binghamton Alumni of Color Network, Founding President

EXPERIENCE

Quinn Emanuel Urquhart & Sullivan, LLP, Washington, DC

Summer Associate

Summer 2023

Conducted legal research and drafted memoranda on a variety of litigation matters. Assisted with sensitive white-collar investigations and several pro bono matters.

Broadway Advocacy Coalition, New York, NY

Policy Fellow

January 2023 – Present

Design political strategy for the Solutions Not Suspensions Initiative, New York Senate Bill S1040. Counsel playwrights on the incorporation of advocacy and activism in their works.

Morrison & Foerster, LLP, Washington, DC

Law Clerk

August 2022 – May 2023

Evaluated the national security landscape and used insights garnered to draft Client Alerts. Produced sector specific research memos to advance client goals.

Wetmore Fellow – Summer Associate

Summer 2022

Conducted internal investigations compiling information needed to draft voluntary self-disclosures for clients navigating OFAC sanctions. Drafted model legislation mandating diversity on state boards and commissions. Researched nationwide state specific requirements for separation agreements.

SEO Law Fellow

Summer 2021

Assisted trial counsel in complex bankruptcy litigation. Analyzed and organized discovery documents for complex litigation matters. Assembled privacy due diligence recommendations for M&A deals. Hosted a Podcast covering the firm's partnership with The Southern Poverty Law Center.

BLACE, New York, NY

Founding Member, Account Manager

October 2019 – June 2020

Managed relationships with key stakeholders at top fortune 500 companies, growing sales revenue by 30% within three months. Collaborated with the Director of Sales Operations to implement innovative processes.

J.P. Morgan, Private Bank, New York, NY

Private Banking Analyst

June 2018 – October 2019

Prepared research materials analyzing client performance, risk-adjusted returns, and the success of strategic allocations resulting in increased assets undermanagement of over \$500 million. Built and maintained relationships with institutional and individual private equity clients coordinating effective communication between clients and back-office stakeholders to ensure superior customer service.

TECHNICAL SKILLS: Series 7 & Series 63 Certified

PHILANTHROPIC AFFILIATIONS: Pi Beta Chapter of Alpha Phi Alpha Fraternity, Incorporated

INTERESTS: Real Estate, Travel, Theatre, Track & Field, Fine Dining



Registration Services

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 registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

06/09/2023 16:52:21

Program: Juris Doctor

Jermel M McClure

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L9401-1	Advanced Breakthrough in Abolition Through Transformative Learning Exchange	Sturm, Susan P.	2.0	A
L9244-1	Criminal Defense Clinic	Baylor, Amber	3.0	A
L9244-2	Criminal Defense Clinic - Project Work	Baylor, Amber	4.0	A
L6269-1	International Law	Cleveland, Sarah; Clooney, Amal	4.0	
L8517-1	Workshop on Facilitating Meaningful Reentry II	Genty, Philip M.; Strauss, Ilene	2.0	CR

Total Registered Points: 15.0**Total Earned Points: 11.0**

January 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L8413-1	S. Theater of Change: Reimagining Justice through Abolition	Squillace, Leia; Sturm, Susan P.	1.0	CR

Total Registered Points: 1.0**Total Earned Points: 1.0**

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-1	Evidence	Shechtman, Paul	3.0	CR
L6675-1	Major Writing Credit	Genty, Philip M.	0.0	
L6274-3	Professional Responsibility	Rose, Kathy	2.0	B+
L9032-1	S. Breakthrough in Abolition Through Transformative Learning Exchange	Rodriguez, Alejo; Sturm, Susan P.	2.0	A
L9032-2	S. Breakthrough in Abolition Through Transformative Learning Exchange - Project Work	Rodriguez, Alejo; Sturm, Susan P.	1.0	CR
L9219-1	S. Critical Race Theory Workshop	Forbes, Flores; Thomas, Kendall; Wilson, Michelle	3.0	A
L6683-1	Supervised Research Paper	Genty, Philip M.	2.0	CR
L8509-1	Workshop on Facilitating Meaningful Reentry I	Genty, Philip M.; Strauss, Ilene	2.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-4	Criminal Law	Seo, Sarah A.	3.0	B
L6667-1	Frederick Douglass Moot Court	Yusuf, Temitope K.	0.0	CR
L6177-1	Law and Contemporary Society	Moglen, Eben	3.0	A
L6121-40	Legal Practice Workshop II	Yusuf, Temitope K.	1.0	P
L6116-4	Property	Merrill, Thomas W.	4.0	B
L6118-2	Torts	Rapaczynski, Andrzej	4.0	B

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-4	Legal Methods II: Methods of Persuasion	Genty, Philip M.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Genty, Philip M.	4.0	B
L6133-3	Constitutional Law	Bulman-Pozen, Jessica	4.0	B
L6105-4	Contracts	Emens, Elizabeth F.	4.0	B
L6113-2	Legal Methods	Briffault, Richard	1.0	CR
L6115-16	Legal Practice Workshop I	McGinnis, Michael Charles; Moe, Alison; Whaley, Hunter	2.0	P

Total Registered Points: 15.0

Total Earned Points: 15.0

Page 2 of 3